TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 422

WILLIAM LINK, PETITIONER,

vs.

WABASH RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1961
CERTIORARI GRANTED NOVEMBER 20, 1961

SUPREME COURT OF THE UNITED STATES

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 19, 1961

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13221

WILLIAM LINK, Plaintiff-Appellant,

vs.

WABASH RAILROAD COMPANY, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Appellant's Record Appendix

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

STATEMENT PURSUANT TO RULE 12(C) OF THE CIRCUIT COURT OF APPEAL RULES

On August 24, 1954, the plaintiff filed complaint.

On September 17, 1954, George T. Schilling and John F. Bodle, 801 Lafayette Life Bldg. Lafayette, Ind. entered appearance for defendant and filed answer.

On April 30, 1955, defendant filed motion for judgment on the pleadings.

On October 18, 1955 the parties were present by counsel and hearing was held on defendant's motion for judgment on the pleadings. Arguments were heard and the motion submitted to the court and taken under advisement.

On November 30, 1955, an order of dismissal was entered and the defendant's motion for judgment on the pleadings granted. It was ordered that the cause be dismissed at plaintiff's costs. (Swygert: J).

On December 28, 1955, notice of appeal was filed.

On March 13, 1957, the mandate from the Circuit Court of Appeals was filed showing judgment of this court reversed, with costs, and the cause was remanded for trial. It was ordered that the appellant William Link recover against the Appellee, the Wabash Railroad Co. the sum of $73.00 for his costs herein expended.

On June 27, 1957 on motion of the plaintiff, and defendant not objecting, the trial scheduled for July 17, 1957 was continued.

[fol. 2] On August 17, 1957 the defendant filed interrogatories.

On February 24, 1959, notice pursuant to Rule 11 was entered, that cause would be dismissed on March 25, 1959, unless the court ordered otherwise.

On March 24, 1959, the plaintiff filed answer to interrogatories and filed motion for default judgment against defendant.

On March 25, 1959, hearing was had on Show Cause order and matter taken under advisement.

On June 4, 1959, order was entered retaining case on the docket and the matter was set for trial July 22, 1959.

On July 2, 1959, order was entered continuing trial setting until further assignment of the court.

On October 12, 1960 the defendant was present by counsel and plaintiff counsel did not appear. Pursuant to the inherent powers of the court and upon failure of plaintiffs counsel to appear at pre-trial, which was scheduled for this day, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, the cause was dismissed and copies of this order forwarded to counsel of record.

On November 10, 1960, the plaintiff files notice of appeal, together with appeal bond.

This is to certify that the following is a true and full copy of the docket entries in the above entitled cause.

8-24-54 Complaint filed. Summons issued and forwarded to Marshal at S.B.

8-31-54 Summons returned served 8-27-54 (4.40).

[fol. 3]

9-17-54 George T. Schilling & John F. Bodle, 801 Lafayette Life Bldg. Lafayette, Ind. files appearance for defendant. Defendant files answer.

4-30-55 Defendant files motion for judgment on the pleadings with certificate of service attached.

10-18-55 Parties present by counsel. Hearing held on defendants motion for judgment on the pleadings. Arguments heard. Motion submitted and taken under advisement.

11-30-55 Order of dismissal entered. Defendant's motion for judgment on the pleadings is granted. It is ordered that this cause be and it is hereby dismissed at plaintiffs costs (copies to counsel). (SE). Swygert: J

12-28-55 Notice of appeal filed. (Certified copy sent to George Schilling). Appeal bond filed. Statement of points on appeal filed. Designation of record on appeal filed with proof of service of the above.

3-13-57 Mandate from Circuit Court of Appeals filed showing judgment of this court reversed, with costs, and this cause is remanded for trial. It is further ordered that appellant William Link, recover against the appellee, The Wabash Railroad Co. the sum of $73.00 for his costs herein expended. Opinion attached thereto.

6-21-57 Plaintiff files motion to continue trial setting.

6-27-57 On motion of plaintiff, defendant not objecting, the trial scheduled for July 17, 1957, is continued until further setting.

8-17-57 Defendant files interrogatories propounded to the plaintiff William Link. Cert. of service attached.

2-24-59 Notice forwarded to counsel that cause will be dismissed on March 25, 1959 pursuant to Rule 11, unless the court orders otherwise.

[fol. 4]

3-24-59 Pltf. files answer to defts. interrogatories. Plaintiff files motion for default judgment against defendant.

3-25-59 Attorney Darlington present for plaintiff. Attorney Schilling present for deft. Hearing held on Show Cause order under Rule 11. Matter taken under adv. Deft. to file certain motions 3-26-59. Plaintiff to have 10 days in which to reply. Deft. 5 days to respond.

6- 4-59 Order entered retaining case on docket. Set for trial 7-22-59 (SE). Swygert: J (Copies to counsel).

7- 2-59 Order entered continuing trial setting until further assignment by the court. (SE) Swygert: J (copies to counsel).

3-11-60 Deft. files interrogatories propounded to the pltf. Wm. Link with certificate of service attached thereto.

3-19-60 Plaintiff files motion to extend time to answer interrogatories.

3-22-60 Order entered granting plaintiff time within which to answer interrogatories to and including Apr. 15, 1960.

4-15-60 Plaintiff files answers to defts. addl. interrog.

10-12-60 Defendant present by counsel. Plaintiff counsel not present. Pursuant to the inherent powers of the court, and upon failure of plaintiffs counsel to appear at a pre-trial, which was scheduled for today October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not

appearing at said pre-trial, the cause is now dismissed (copies to counsel).

11-10-60 Plaintiff files notice of appeal, together with appeal bond. Clerk's certificate and copy of notice mailed to attys. for deft.

11-28-60 [fol. 5] Conference had at the request of plaintiff counsel. Counsel for both sides present in open court. At the conclusions of the conference, the court indicates that nothing presently pends before the court upon which the court might act and the conference is thereupon terminated. (Reported by Paul Brookins, Rm. 1001, 180 W. Wash. Chgo. 2, Ill.).

Attest: /s/ Kenneth Lackey
Clerk

By /s/ Jean Erickson
Deputy

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Page No.	Pleading	Date Filed

Attached hereto is the printed record as certified to in a previous appeal of the above entitled cause of action, said printed record numbers pages 1 through 12 and consists of the following:

Statement under Rule 10(b) (of Court of Appeals)

Certificate of Clerk of the U. S. District Court as to Record.

Complaint

Answer

Motion for judgment on the pleadings

Order of dismissal

Notice of Appeal

Order (July 2, 1959)

At defendant's request, to which request plaintiff agrees, the trial of this case set for July 22, 1959 is continued until further assignment by the Court.

Enter:

Luther M. Swygert, Judge.

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

INTERROGATORIES PROPOUNDED TO THE PLAINTIFF, WILLIAM LINK—Filed March 11, 1960

Pursuant to Rule 33 of the Rules of Civil Procedure the defendant, Wabash Railroad Company, propounds the following interrogatories to the plaintiff, William Link, to be answered by him in writing, under oath, and in the manner and at the time specified under Rule 33, and in accordance with present Rule 8 of the Rules of the United States District Court for the Northern District of Indiana:

1. What is the address of your present residence?

2. At what addresses have you resided since March 24, 1959, which are not listed in your answer to the preceding interrogatory.

3. State the total compensation earned by you during the year 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, and 1959.

[fol. 7] 4. State the name and address of every person, firm or corporation by whom you have been employed since March 24, 1959.

5. As to each employer listed in your answer to the preceding interrogatory state:

(a) the nature of the business of such employer,

(b) the nature of your work for such employer,

(c) the date on which your employment commenced and the date on which your employment terminated,

(d) the average number of hours you worked each week,

(e) the rate or rates by which your compensation was computed,

(f) the total compensation earned by you.

6. State the dates and periods of time on and during which you have been a patient in a hospital or clinic

since March 24, 1959 and state the address of each such hospital or clinic.

7. State as to each hospital or clinic listed in your answer to the preceding interrogatory, the total charges made for the services rendered by such hospital or clinic and state the date and amount of every payment made by you or on your behalf on account of such charge.

8. State the name and address of each physician or surgeon who has examined you or who has been consulted by you or who has been consulted by anyone on your behalf since March 24, 1959.

9. State the date and place when and where each such examination or consultation took place and state the names and addresses of all persons who were present at the time of each such examination or consultation.

Stuart, Branigin, Ricks & Schilling, By Russell H. Hart, 801 Lafayette Life Building, Lafayette, Indiana, Phone SHerwood 2-8485, Attorneys for Defendant.

[fol. 8] (Appended Certificate of Service of above is omitted here.)

In United States District Court

Order (March 22, 1960)

Pursuant to plaintiff's motion to extend time to answer interrogatories, it is

Ordered that the time for plaintiff to answer interrogatories be extended to and including April 15, 1960.

Robert H. Grant, Judge.

In United States District Court

Plaintiff's Answers to Defendant's Additional Interrogatories Filed March 11, 1960—Answers filed April 15, 1960

Comes now the plaintiff and makes the following answers to defendant's said additional interrogatories:

1. R. R. 5, Valparaiso, Indiana.

2. Only as stated in No. 1.

3. For year 1959, $4,160.00 gross, and approximately $3,848.00 take-home. Figures for years 1951-1958 not presently in hands of plaintiff's counsel as this is written, but will be supplied in supplemental answer.

4. Rhoda's Truck Service, Valparaiso, Indiana, only.

5(a). Trucking, and selling and service of industrial machinery.

5(b). Salesman.

5(c). About April 1, 1958 and still continue.

5(d). About fifty hours per week.

5(e). Weekly salary, gross $80.00 per week, take-home approximately $74.00 per week.

5(f). Approximately $8400.00 gross and approximately $7844.00 take-home.

6. None.

7. None.

8. None.

9. None.

William Link

[fol. 9] (Plaintiff's affidavit verifying above answers (Tr. 20) is not printed here.)

In United States District Court

Order Dismissing Case—October 12, 1960

Order Book Entry: Luther M. Swygert: J.

October 12, 1960

Pursuant to the inherent powers of the Court, and upon failure of plaintiff's counsel to appear at a pre-trial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, the cause is now dismissed.

Luther M. Swygert, Judge.

In United States District Court

Notice of Appeal—Filed November 10, 1960

The above named plaintiff, William Link, hereby gives notice that he appeals to the United States Court of Appeals for the Seventh Circuit, from the final order and judgment entered herein by the United States District Court for the Northern District of Indiana, Hammond Division, (from which this appeal is taken), which order and judgment was entered October 12, 1960, dismissing the plaintiff's action herein.

Jay E. Darlington, Attorney for Plaintiff-Appellant.

(Clerk's certificate of mailing above notice on November 10, 1960 (Tr. p. 22) and Appeal Bond of $250, filed November 10, 1960 (Tr. 24) are not printed here.)

[fol. 10]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

Civil Action No. 1639

WILLIAM LINK, Plaintiff,

vs.

THE WABASH RAILROAD COMPANY, Defendant.

Record of proceedings in the above entitled cause of action before the Honorable Luther M. Swygert, United States District Judge, commencing Wednesday, October 12, 1960, at 3:00 o'clock P. M.

Appearances:

John F. Bodle, Esq., of Lafayette, Indiana, representing the defendant.

PROCEEDINGS OF OCTOBER 12, 1960

The Court: This is the case of William Link vs. the Wabash Railroad Company, with regard to the pretrial hearing.

Do you care to address the Court, Mr. Bodle?

Mr. Bodle: May I say to the Court, we received a notice of this pretrial hearing on September 30, and I am, of course, present, and have been since 1:00 o'clock for the purpose of attending the pretrial. As we all know, neither the plaintiff nor his counsel have appeared.

I understand that the matter now before the Court rests entirely with relation to this failure of plaintiff and his counsel to appear on the pretrial.

[fol. 11] The Court: Did you hear from Mr. Darlington previous to today?

Mr. Bodle: Yes, sir, at about 10:30 Daylight Time yesterday morning I had a telephone call from Mr. Darlington, stating he was in Indianapolis, and he stated that he expected to be here. He didn't know, however, if he would be able to attend a deposition which I was to take of his plaintiff pursuant to a notice which I had given on the 30th of September, by mail. He told me he wasn't prepared to say if he would or would not be present at that deposition.

As it turned out, he isn't present before the Court now and he wasn't there this morning at the stated place and time for the deposition.

The Court: Was he there at all during the time you waited for him?

Mr. Bodle: No, sir. I waited in Gavit and Eichhorn's office until I received a call from Miss Griffith at 11:30 Daylight Time, in which I was advised that Mr. Darlington had called the Court from Indianapolis, and had indicated some doubt that he would be here for the pretrial.

That is the extent of the contact I've had from Mr. Darlington since the time the Court sent out its notice of the pretrial.

This, of course, as the Court will recall, is a case which was up for dismissal on the Court's own motion on local Rule 11 some time ago, and I would suggest to the Court the fact that the record doesn't show that there has ever been any trial setting requested by the plaintiff since that time, and he, of course, is not here in person or by counsel this afternoon, and—

The Court: (Interposing) What did Mr. Darlington say as to why he couldn't be present?

Mr. Bodle: He told me he thought he could be here for the [fol. 12] pretrial this afternoon. He told me his reason for being in Indianapolis—that he was doing some work on some papers. I understand he was getting ready to file some papers, but he didn't inform me specifically as to the Court or the case.

The Court: He didn't indicate to you he was engaged before a Court during this time?

Mr. Bodle: No, sir.

The Court: Is there anything else?

Mr. Bodle: I think, so far as the evidence presented before the Court is concerned, relating to the pretrial, that is about all the information I have, your Honor.

It is, of course, true that there have been delays in other respects by the plaintiff. There are certain interrogatories still unanswered, but I have no motion presently pending with relation to those matters. Today, however, we are concerned with plaintiff's failure to appear for the pretrial.

The Court: I have asked Miss Griffith to come into the courtroom, and I would like to ask you, Miss Griffith, to recall as best as you can and state what Mr. Darlington said to you this morning when he called, and what you might have said to him.

Miss Griffith: He called about 10:45, and said he was in Indianapolis—that he was busy preparing papers to file with the Supreme Court. He said he wasn't actually engaged in argument and that he couldn't be here by 1:00 o'clock, but he would be here either Thursday afternoon or any time Friday if it could be reset.

At first he asked to talk to you, but you were on the bench, and he then asked if I could convey this to you. I asked him if he had contacted Mr. Bodle, and he said he had yesterday, and he said that he couldn't be there, and I don't know, of course, if he meant for the pretrial or for the deposition.

[fol. 13] The Court: What did you tell him?

Miss Griffith: I told him I would talk to you, and I did ask if he knew where Mr. Bodle was today, and he said yes, that he was at Gavit and Eichhorn's office and was supposed to be taking a deposition, so I said I would call him, and he asked me to convey the message to you before calling Mr. Bodle.

The Court: That is all, as you recall it, that was said?

Miss Griffith: Yes sir.

The Court: Thank you. Under the circumstances, what is your thinking, Mr. Bodle?

Mr. Bodle: I would certainly suggest to the Court that it has inherent authority to dismiss cases, not only under its own local rule concerning prosecution, but it has inherent power, without any specific rule, by virtue of Federal Rule 83, and the inherent power of the Court to dismiss where

the Court thinks it necessary under the particular situations not provided for by any specific local rule.

It is my understanding that Local Rule 12 was for pretrials—or rather that local Rule 12, under which pretrials may be held on notice to counsel, which notice has been given, your Honor, under that local rule in this case, and it certainly seems to me that this is a case for the Court to exercise its inherent power to order a dismissal for the failure of the plaintiff to appear pursuant to the notice of pretrial, particularly since no attempt was made at any time by plaintiff or his counsel to give any real compelling reason or any substantial advance notice as to why a resetting might be desired. In fact, no formal notice of any kind was ever received from the plaintiff in that regard.

The Court: Miss Griffith, from the time you sent notices to Mr. Darlington and Mr. Bodle, have you ever heard from him insofar as any request for a continuance is concerned? [fol. 14] Miss Griffith: No, sir.

The Court: Have you ever heard from him insofar as any request for a continuance is concerned because of the fact he couldn't be here or didn't intend to be here?

Miss Griffith: Not until today.

The Court: When was the notice sent?

Miss Griffith: I have just my own note that a pretrial notice was sent on September 29.

The Court: You received the notice?

Mr. Bodle: We did, your Honor. Our law firm received that notice in Lafayette certainly by September 30, because it was on that date that I wrote a letter to Mr. Darlington concerning the deposition, and I sent him a notice of the deposition on that date.

The Court: Is there anything else you want to say before I take action on this request?

Mr. Bodle: No, sir, I believe I have related to the Court all I know concerning this matter of a pretrial notice.

The Court: This case has been pending since August 24, 1954, and I believe is it not, Miss Griffith, the oldest case we have?

Miss Griffith: Yes, the oldest civil case.

The Court: What is the next number we have? Do you know offhand when the next case was filed that is pending?

Miss Griffith: It is in the twenty hundreds, jumping from sixteen to twenty.

The Court: I have the docket sheet in front of me, and it shows that on June 21, 1957, there was a motion the plaintiff filed, which was a motion to continue the trial setting. It was continued on July 27, 1957.

In 1959, there was a notice, under Rule 11, to dismiss for failure to prosecute, which was sent by the clerk, and there was a hearing on that, as the record indicates, on March 25, 1959, and on June 4, 1959, an order was entered leaving the case on the docket.

[fol. 15] It was set for trial on July 22, 1959, and on July 2, 1959, an order was entered continuing the trial. The record doesn't indicate the reason for that continuance. Do you have knowledge of that?

Mr. Bodle: That was done by agreement. The motion originated with the defendant, and it was agreed to or concurred in by the plaintiff.

The Court: In view of the history of this case, insofar as its filing date and the attempts to have this matter come on for trial, as far as I know all of the trial settings have been at the Court's own motion and not as a result of the parties or the plaintiff to have the matter come on for trial, so it seems to me that there is no reasonable showing why (1) plaintiff's counsel could not have notified the Court and defense counsel about his whereabouts or the need of his being elsewhere, if there was a need of being elsewhere at the hour set for the time of the pretrial, and (2) his failure to be here, his failure to indicate in my view a reasonable reason for not being here—if counsel was engaged before a Court or had some other reason why he could not physically be here—but the reason stated, that he was preparing papers to be filed in another Court, and since there was no showing, in his telephone conversation either with Mr. Bodle or to Miss Griffith, that whatever he was doing, even though it was not before a Court, that it was of such urgent emergency reasons that he had to be in Indianapolis for the reason stated on the telephone, and (3) in view of the fact that he had notice, as indicated, and no effort was made previous to today to ask for a resetting, and whatever action I am taking, I don't know that I should base it on

that reason, but I think it is pertinent because of the fact of what you have said about his failure to appear for the deposition on notice, and in light of the apparent failure over the years of plaintiff to request that this case be tried [fol. 16] or brought to trial, it just seems to me that the Court should, in view of all these circumstances, exercise its inherent power to dismiss this action.

The Court is charged with a duty in the administration of the Court to dispose of or to try and dispose of cases.

It doesn't seem to me that counsel should put other counsel to the inconvenience and trouble and expense to his client to appear for a hearing without notice of it not going to be held, or without proper notice or advance notice, so it seems to me, in the light of the failure of plaintiff's counsel to indicate that he desires to prosecute this action—he indicates evidence by his action today in his failing to appear at the deposition and at the pretrial, and in light of the other matters about this case, the history of its being the oldest case and having been set only at the instance of the Court for trial, having been continued in one instance by the plaintiff and at the plaintiff's request, the Court now dismisses this case for failure of the plaintiff's counsel to appear at the pretrial, for failure to prosecute this action.

The Clerk is now directed to enter an order to this effect: Pursuant to the inherent powers of the Court and upon failure of plaintiff's counsel to appear at a pretrial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at the said pretrial, the cause is now dismissed.

Is there anything further, Mr. Bodle?

Mr. Bodle: No, your Honor, but I would appreciate having a copy of the proceedings and the order.

The Court: Very well. Thank you, Mr. Bodle, for your patience.

(And thereupon, the hearing in the above-captioned matter was concluded on Wednesday, October 12, 1960, at 3:30 o'clock P.M.)

[fol. 17]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1960—APRIL SESSION, 1961.

No. 13221

WILLIAM LINK, Plaintiff-Appellant,

v.

WABASH RAILROAD COMPANY, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

May 26, 1961

Before Hastings, Chief Judge, Schnackenberg and Knoch, Circuit Judges.

HASTINGS, Chief Judge. This is an appeal by plaintiff from an order of the district court entered October 12, 1960 dismissing this cause of action for failure of plaintiff's counsel to appear in court for a pre-trial conference scheduled for hearing on that date.

The order appealed from reads:

> "Pursuant to the inherent powers of the Court, and upon failure of plaintiff's counsel to appear at a pre-trial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, the cause is now dismissed."

[fol. 18] The history of this litigation is revealed by the record before us in this appeal.

On August 24, 1954, plaintiff William Link filed his complaint in the district court against defendant The Wabash Railroad Company to recover damages for injuries alleged to have been sustained by him when he drove an automobile into a collision with defendant's train standing across a highway in Indiana.

On September 17, 1954, defendant appeared and filed its answer to the complaint.

On April 30, 1955, defendant filed its motion for judgment on the pleadings. On October 18, 1955, hearing was had on this motion. On November 30, 1955, the district court granted defendant's motion for judgment on the pleadings and ordered the cause dismissed. From this order of dismissal plaintiff appealed. On October 10, 1956, our court reversed and remanded the case for trial. *Link* v. *Wabash Railroad Company*, 7 Cir., 237 F. 2d 1 (1956), cert. denied, 352 U.S. 1003 (February 25, 1957). On March 13, 1957, the mandate from this court was filed in the district court.

Subsequently, the trial court set the case for trial for July 17, 1957. On June 27, 1957, on motion of plaintiff and defendant not objecting, the trial date of July 17, 1957 was vacated; and the cause was continued.

On August 17, 1957, defendant filed interrogatories for plaintiff to answer.

On February 24, 1959, the trial court on its own initiative gave notice to the parties, pursuant to Local Rule 11,[1] that the cause would be dismissed on March 25, 1959, unless the court ordered otherwise.

[fol. 19] On March 24, 1959, plaintiff filed answers to defendant's interrogatories.

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[1] Local Rule 11 of the United States District Court, Northern District of Indiana, effective September 1, 1955 (now Local Rule 10, effective March 1, 1960) reads:

> "Dismissal of Civil Cases Because of Lack of Prosecution. Civil cases in which no action has been taken for a period of one year may be dismissed for want of prosecution with judgment for costs after thirty days notice given by the clerk to the attorneys of record unless, for good cause shown, the court orders otherwise." See, *Darlington* v. *Studebaker-Packard Corporation*, 7 Cir., 261 F. 2d 903, 905 (1959), cert. denied, 359 U.S. 992.

On March 25, 1959, hearing was had on the show cause order, and on June 4, 1959 the trial court entered an order retaining the case on the docket and setting it for trial for July 22, 1959.

On July 2, 1959, on defendant's motion, to which plaintiff agreed, the trial date of July 22, 1959 was vacated; and the case was continued.

On March 11, 1960, defendant filed additional interrogatories for plaintiff to answer. On April 15, 1960, after an extension of time granted by the trial court, plaintiff filed answers to the additional interrogatories.

On September 29, 1960, pursuant to Local Rule 12, effective March 1, 1960, the district court caused notice to be mailed to counsel for both parties scheduling a pre-trial conference in this case to be held in court on October 12, 1960, at 1:00 o'clock p.m.

It is undisputed that counsel for both parties received this notice of the pre-trial conference. It is undisputed that Local Rule 12 was in force at the times in question and was adopted pursuant to an order of the district court.

Local Rule 12 provides:

> "The court may hold pre-trial conferences in any civil case upon notice given to counsel for all parties."

Pre-trial procedure is authorized by Rule 16, Federal Rules of Civil Procedure, 28 U.S.C.A. Local rule making power generally in the district court is derived from 28 U.S.C.A. § 2071. Rule 83, Federal Rules of Civil Procedure, provides:

> "* * * In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

On October 12, 1960, at 1:00 o'clock p.m., the time fixed for the pre-trial conference, the district judge called this case for pre-trial hearing. Defendant's counsel was present in court. Plaintiff's counsel did not appear. At 3:00 [fol. 20] p.m., plaintiff's counsel not having appeared, the district court entered the foregoing order of dismissal.

The transcript of the proceedings had in court preceding the entry of the order of dismissal reveals the following factual situation which is not disputed by plaintiff.

The district judge's secretary was called into court and requested by the court to make a statement. She said that she mailed notice of the pre-trial conference to all counsel on September 29, 1960. She gave the following report to the court:

> "He [plaintiff's counsel] called about 10:45 [on Wednesday, October 12, 1960], and said he was in Indianapolis—that he was busy preparing papers to file with the [Indiana] Supreme Court. He said he wasn't actually engaged in argument and that he couldn't be here by 1:00 o'clock, but he would be here either Thursday afternoon or any time Friday if it could be reset.
>
> "At first he asked to talk to you, but you were on the bench, and he then asked if I could convey this to you.
>
> "I asked him if he had contacted Mr. Bodle [defendant's counsel], and he said he had yesterday, and he said he couldn't be there, and I don't know, of course, if he meant for the pretrial or for the deposition."

She stated that she told plaintiff's counsel she would convey this message to the court and opposing counsel. She also reported that this was the oldest civil case on the court docket. It further appeared that this was the first and only attempt counsel made to have the pre-trial conference continued.

Defendant's counsel stated to the district court at this time that plaintiff's counsel called him on the preceding morning (October 11, 1960) from Indianapolis and stated that he expected to be in court for the pre-trial but did not know whether he would attend the taking of a deposition of plaintiff set for the next day. He further stated counsel said "he was doing some work on some papers." [fol. 21] He said that was the extent of his contact with him "since the time the Court sent out its notice of the pretrial," which he received on September 30, 1960. He had a call from the secretary of the district judge reporting the mes-

sage telephoned to her on the day of the hearing from Indianapolis by plaintiff's counsel.

The trial judge then reviewed the history of this litigation and pointed out that plaintiff's counsel had notice of the hearing, did not appear for the hearing and had failed to indicate any "reasonable reason" for not appearing. In view of all the circumstances surrounding counsel's action in the case, the trial court concluded that it should "exercise its inherent power to dismiss this action" upon "failure of plaintiff's counsel to appear at a pretrial * * * counsel having failed to give any good and sufficient reason for not appearing at the said pretrial." The case was then dismissed.

Plaintiff first contends that the dismissal was erroneous because nothing was scheduled for hearing on October 12, 1960 except the pre-trial conference and that this "had not been set by any *order* of the court but by a 'pre-trial notice'" sent to counsel. We think this contention is without merit. The "notice" was sent pursuant to Local Rule 12 of the district court. Local Rule 12 had been promulgated by an order of the court. Certainly a notice sent pursuant to an order of the court embodied in a court rule does and should have all the force and effect of an order of the court. Further, plaintiff has not cited any authority requiring that a pre-trial conference be scheduled by a specific court order to give it validity. It is well settled that court rules have the force of law. *Weil* v. *Neary*, 278 U.S. 160, 169 (1929).

Plaintiff argues that there was no motion by defendant for dismissal. Since the trial court did not base its dismissal on Local Rule 11, *supra*, or on Rule 41(b), Federal Rules of Civil Procedure, for want of prosecution, no such motion was required. It is quite clear to us that district courts have ample authority to "regulate their practice in any manner not inconsistent with" the Federal Rules of Civil Procedure, as provided in Rule 83, *supra*. This case comes within the purview of that rule.

[fol. 22] Plaintiff maintains that Local Rule 12, *supra*, providing for pre-trial conferences, contains no sanctions calling for dismissal, or otherwise, and that in the absence of a provision for such sanctions the trial court erred. It is

sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures and to impose appropriate sanctions for failure to comply. The authorities are all to the contrary.

In *Darlington* v. *Studebaker-Packard Corporation*, 7 Cir., 261 F. 2d 903, 905 (1959), cert. denied, 359 U.S. 992, where we upheld the dismissal of a cause under another local rule (for want of prosecution), we said that " * * * it is within the court's inherent power to so dismiss an action without authority of statute or rule," citing *Hicks* v. *Bekins Moving & Storage Co.*, 9 Cir., 115 F. 2d 406, 408, 409 (1940). On the general inherent power of a court to dismiss an action as a sanction for disobedience of a court order, see Annotation, 4 A.L.R. 2d 348.

Courts may exercise their inherent powers and invoke dismissal as a sanction in situations involving disregard by parties of orders, rules or settings. *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & E. Co.*, 8 Cir., 245 F. 2d 613, 628 (1957), cert. denied, 355 U.S. 871; *Refior* v. *Lansing Drop Forge Co.*, 6 Cir., 124 F. 2d 440, 444 (1942), cert. denied, 316 U.S. 671. In the recent case of *Jameson* v. *DuComb*, 7 Cir., 275 F. 2d 293, 294 (1960), this court upheld a dismissal because of the failure of plaintiff to be present at the trial on the date previously set for the trial. The court there found no abuse of discretion on the part of the trial court. As the court pointed out in *Refior, supra*, 124 F. 2d at 444, "Every litigant has the duty to comply with the reasonable orders of the court and, if such compliance is not forthcoming, the court has the power to apply the penalty of dismissal." See also, *Joseph* v. *Norton Company*, D.C.S.D.N.Y. 24 F.R.D. 72 (1959), affirmed, 2 Cir., 273 F. 2d 65 (1959).

The sanction of dismissal has been imposed for failure to comply with pre-trial settings. *Dalrymple* v. *Pittsburgh Consolidated Coal Company*, D.C.W.D.Penn., 24 F.R.D. 260 (1959); *Wisdom* v. *Texas Co.*, D.C.N.D.Ala., 27 F. Supp. 922 (1939). In *Wisdom, supra*, plaintiff failed to appear at [fol. 23] the pre-trial hearing; and the court dismissed the case, on motion of defendant, for failure to prosecute the action and for failure to comply with the Federal Rules of Civil Procedure, pursuant to Rule 41(b) of such rules.

In 5 Moore's Federal Practice, p. 1038, note 15 (2d ed.), it is said that the dismissal in *Wisdom* "could also be regarded as a dismissal for failure to comply with an order of the court * * *." In *Dalrymple, supra*, 24 F.R.D. at page 262, the court noted that its local pre-trial rule was promulgated under Rules 16 and 83, Federal Rules of Civil Procedure, and said that the local rule "was designed to promote the expeditious processing of civil litigation * * *." "But unless appropriate sanctions are firmly imposed by the court for flagrant disobedience of its orders, the salutary purpose of [the local rule] will be entirely frustrated and the progress of litigation in this district hopelessly impeded."

Plaintiff argues that there was adequate showing of the inability of his counsel to be present at the pre-trial conference. We disagree. His brief refutes this contention wherein he states, "Plaintiff's counsel has *previously* become engaged in an important matter in the *Indiana Supreme Court*, not oral argument but preparing urgent papers of some kind, which required him to be in *Indianapolis*. As often happens in law work, the task took longer than expected, so that it occupied the day which had been set for this pre-trial conference * * *." With knowledge of the time and place of the pre-trial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it. In our opinion, this falls far short of being a legitimate excuse for failing to appear in court at the time fixed.

Plaintiff contends that the sanction of dismissal is unnecessarily harsh. In oral argument his counsel conceded that the district court might have disciplined him by imposing a lesser sanction. Many of the cases herein cited demonstrate that the character or degree of the sanction is within the discretion of the trial court. Under the circumstances of this case we find no abuse of discretion on the part of the trial court is dismissing the action.

Finally, in oral argument, plaintiff's counsel urged that his client should not be made to suffer a dismissal because [fol. 24] of counsel's failure in this matter. The short answer to this is that the action or lack of action on the part of counsel is that of his client.

Pre-trial procedure has become an integrated part of the judicial process on the trial level. Courts must be free to use it and to control and enforce its operation. Otherwise, the orderly administration of justice will be removed from control of the trial court and placed in the hands of counsel. We do not believe such a course is within the contemplation of the law.

We find no error in the dismissal of this cause by the district court. The order of dismissal appealed from is affirmed.

Affirmed.

No. 13221

SCHNACKENBERG, Circuit Judge, dissenting.

I take as my text this 1952 pronouncement of the Supreme Court of New Jersey:

> "The *dismissal of a party's cause of action* is drastic punishment and should not be invoked except in those cases where the actions of the *party* show a deliberate and contumacious disregard of the court's authority. * * * It seems to us that the plaintiff's conduct here did not warrant such severe punishment, particularly in view of the fact that the defendant would have suffered no loss by a further short adjournment which very well might have been granted on terms.
>
> "* * * But courts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full utilization of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of *as their paramount objective.* * * *" (Italics supplied).

Allegro v. *Afton Village Corp.*, 87 A.2d 430, 432.

In this case there was an absence of the usual grounds for the involuntary dismissal of a suit. For instance there [fol. 25] cannot be a serious contention that plaintiff's suit was vexatious or fictitious, 27 C.J.S. 403. We had already

held in *Link* v. *Wabash R. R. Co.*, 237 F.2d 1, that his complaint stated a cause of action and we had remanded the case to the district court for trial. The United States Supreme Court denied *certiorari*, 352 U.S. 1003.

Defendant's counsel makes no effort to rely upon want of prosecution as a ground for the involuntary dismissal. Obviously defendant is in no position to make such a contention, inasmuch as it caused the district court to vacate the order setting the case for trial on July 22, 1959, and continue the case. Even if it had not done so, it is clear that its acquiescence in the delay would bar a dismissal of plaintiff's case for want of prosecution. 27 C.J.S. 445.

Therefore, there exists no basis for sustaining the dismissal order from which plaintiff has appealed, unless it is shown that there has been a disobedience by plaintiff of a court order. 27 C.J.S. 406. There is no such showing, because, first, there was no order commanding plaintiff to do anything and hence no possibility of his being disobedient, and, secondly, there is no evidence that the plaintiff even had any knowledge of the proceedings which the trial court described as its exercise of "its inherent power to dismiss this action" upon "failure of plaintiff's counsel to appear at a pretrial * * * ".

It is unnecessary to discuss the rationale of the holding that a pretrial conference was called in accordance with rules and that plaintiff's counsel did not appear. Certainly there is no suggestion that plaintiff was ever ordered or even requested to appear at such a conference. His counsel was requested to do so and did not appear because, as he informed the judge's secretary, he was engaged in some activity in connection with business before the Indiana Supreme Court, at which time he requested a delay of a day or two for the conference. This message was conveyed to the trial judge. It further appears that plaintiff's counsel had informed defendant's counsel the preceding morning of his absence at Indianapolis.

On this showing the court dismissed plaintiff's case. [fol. 26] If one accedes to the proposition that plaintiff's counsel, despite his commitment at Indianapolis, should have been in attendance at the pretrial conference, and that

his absence from the conference was inexcusable and made him amenable to discipline as an officer of the court, it is impossible to logically bridge the gap and to inflict disciplinary punishment upon his client rather than upon the attorney. The cause of action of the plaintiff for serious and permanent personal injuries and loss of earnings has been by the action of the court dismissed, not for any violation of any order by the plaintiff, but for an alleged dereliction by a lawyer who was held out to the plaintiff as one to whom he could entrust the handling of his case in the federal courts. It must be remembered that the attorney had been practicing for years in both the district court and this court of appeals.

The order now affirmed has inflicted a serious injury upon an injured man and his family, who are innocent of any wrongdoing. Plaintiff's cause of action, bearing the stamp of approval of this court, was his property. It has been destroyed.[1] The district court, to punish a lawyer, has confiscated another's property without process of law, which offends the constitution. A district court does not lack disciplinary authority over an attorney and there is no justification, moral or legal, for its punishment of an innocent litigant for the personal conduct of his counsel. Because it was neither necessary nor proper to visit the sin of the lawyer upon his client, I would reverse.

[1] 28 U.S.C.A. rule 41 (b).

[fol. 27]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13221

WILLIAM LINK, Plaintiff-Appellant,

vs.

WABASH RAILROAD COMPANY, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

JUDGMENT—May 26, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court entered therein on October 12, 1960, in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

[fol. 28]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13221

WILLIAM LINK, Plaintiff-Appellant,

vs.

WABASH RAILROAD COMPANY, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

ORDER DENYING PETITION FOR REHEARING—June 21, 1961

It Is Ordered by the Court that the appellant's petition for a rehearing of this cause be, and the same is hereby, Denied.

(Schnackenberg, C.J. voted to grant appellant's petition for rehearing.)

[fol. 29] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 30]

SUPREME COURT OF THE UNITED STATES

No. 422, October Term, 1961

WILLIAM LINK, Petitioner,

vs.

WABASH RAILROAD COMPANY.

ORDER ALLOWING CERTIORARI—November 20, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

November 20, 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 422

WILLIAM LINK,

Petitioner,

vs.

WABASH RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
For the Seventh Circuit

(Opinion below is Appended Hereto)

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TEXTS.

IN THE

SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
For the Seventh Circuit

(Opinion below is Appended Hereto)

To The Honorable, The Chief Juistice and Associate Justices of The Supreme Court of the United States:

The above named Petitioner respectfully petitions this Court to issue its writ of certiorari to said Court of Appeals, to review that Court's judgment affirming a final judgment of the United States District Court for the Northern District of Indiana which dismissed this petitioner-plaintiff's civil action for damages for personal injuries (without trial).

Opinions Below.

The opinion of the Court of Appeals, set forth in the Appendix of this petition at pages 1(a)-10(a), is reported in:

Link v. *Wabash Railroad Co.* (C.A. 7, 1961) 291 F. 2d, 542 (Judge Schnackenberg dissenting at p. 547).

No opinion was filed by the District Court.

Grounds for Invoking This Court's Jurisdiction.

This Court's general jurisdiction to review final judgments of the Courts of Appeals in civil cases is invoked.

The Court of Appeals rendered its opinion and judgment of affirmance on May 26, 1961, following which a timely petition for rehearing by this petitioner-plaintiff was entertained and denied on the merits on June 21, 1961. (Appendix, 12(a) and 13(a). This Petition is being filed on the ninetieth day thereafter, September 19, 1961.

This Court's jurisdiction is based upon 28 U.S.C. 1254(1).

Questions Presented for Review.

(1) The *extent* of a District Court's asserted "inherent power" in a civil case, *beyond the Rules of Civil Procedure, and beyond the District Court's local rules.*

Specifically applying the above question: When this petitioner-plaintiff's personal injury case was at issue, but *not set for trial,* and the Court had called for counsel to come in for *a pre-trial conference,* by means of a mimeo-

graphed letter, and plaintiff's counsel failed to attend this noticed hearing,—did the District Court have the "inherent power" to enter final judgment dismissing the action with prejudice on account of this failure, *in the absence of any Rule of Civil Procedure or any local rule of the District Court authorizing such dismissal under such circumstances?*

(2) Secondary to No. 1, — if such "inherent power" did exist, did the District Court abuse the power in this case, in view of the fact that before the hour for the pre-trial hearing, plaintiff's counsel conveyed word to the Judge and to opposing counsel of his inability to attend the hearing that particular day, stating it was due to his necessary absence that day 160 miles away in Indianapolis working on an urgent case in the Supreme Court of Indiana, but that he would be ready to attend the conference the *next day* or any day thereafter?

Constitutional Provisions, Rules, etc. Involved.

No statute, federal or state, is involved in the present Petition.

The only constitutional provision which might be involved is that part of the *Fifth Amendment* to the Constitution of the United States, reading:

> "No person shall • • • be deprived of life, liberty, or *property,* without *due process* of law; • • •" (Our emphasis)

Petitioner believes that the alleged arbitrary assumption of power by the District Court in this case (approved by a 2 to 1 majority of the Court of Appeals) is sufficiently

serious from a standpoint of orderly and responsible administration of justice in the District Courts, so that it would be in the public interest for this Court to treat this Petition, and any further review which it might give, on the basis of a denial of Petitioner's *constitutional rights,* rather than on a basis of mere procedural error. Hence, we think the *basis* for review is discretionary with this Court.

More directly involved, for the same reasons, is *this Court's Rule 19, par. 1 (b)* indicating the character of reasons which will be considered" (for granting a writ of certiorari)—

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same manner; • • • or has so far departed from the accepted and usual course of judicial proceedings, *or so far sanctioned such a departure by a lower court,* as to call for an exercise of *this court's power of supervision.*" (Our emphasis)

The only Rules directly involved in this petition are the following **relating to pre-trial conferences.** First, is the **District Court's Local Rule 12** which, without adding anything to the Rules of Civil Procedure on that subject, provides:

> "*Pre-Trial Conferences.*
>
> "The court *may* hold pre-trial *conferences* in any civil case upon *notice* given to counsel for all parties." (Our emphasis). (Effective March 1, 1960).

The above is simply a local application of **Rule 16 of Civil Procedure,** which reads

> "*Rule 16. Pre-Trial Procedure; Formulating Issues.*
>
> "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a *conference* to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the *action taken at the conference,* the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions." (Our emphasis)

The District Judge *made* the dismissal, and the majority opinion of the Court of Appeals *upheld* it, on the doctrine of the District Court's supposed "*inherent power*" to make such dismissals *outside the Rules* of Civil Procedure and outside its own Local Rule on the *subject* of dismissals. (See opinion at 291 F. 2d 542, 545, Appendix hereof, p. 5a, and Argument hereof, at pp. 13 *infra.*)

Nevertheless, *the Rule of Civil Procedure governing involuntary dismissals is pertinent to our Petition* because we contend that it *defined* and made *uniform* the *powers*

and *procedure* of District Courts on the *subject* of dismissals,—not to be overridden by local rules, still less to be overridden by some asserted and *undefined* "*inherent power*" of a District Court to dismiss even outside of the local rule.

Rule 41(b) of Civil Procedure provides:

> "(b) Involuntary Dismissal: Effect Thereof. For *failure of the plaintiff to prosecute* or to comply with these rules or any order of court, *a defendant may move* for dismissal of an action or any claim against him * * *" (Our emphasis).

In conjunction with the language of *Rule 41 (b)*, last quoted, *requiring a motion by the defendant* as a *basis* for the Court to order a dismissal, the following **Local Rule 6** of this District Court will be pertinent, because it spells out strict and detailed provisions *requiring notice* and other acts by the moving party as a *prerequisite* to *motions to dismiss:*

> "(a) The time of *hearing motions* shall be *fixed* by the court. Dates of hearing shall not be specified in the notice of the motion unless prior authorization be obtained from the judge or his secretary. When time is not specified in the notice, request for hearings may be made by either counsel after the motion has been filed.
>
> (b) Motions *to dismiss,* for summary judgment, and for judgment on the pleadings *shall* be accompanied by a *brief.* An adverse party *shall have 15 days* after service of the movant's brief to *file an answer brief.* Failure to file briefs within the time prescribed shall subject such motions to summary ruling and without oral argument." (Our emphasis).
>
> District Court Rule 6 (a) (b)
> (Effective March 1, 1960).

Rule 83 of Civil Procedure entitled "Rules by District Courts," which is the *only* rule devoted to that *subject*, reads:

> "Each district court by action of a majority of the judges thereof may from time to time *make* and amend *rules* governing *its practice not inconsistent* with these rules. *Copies of rules* and amendments so made by any district court shall upon their promulgation be *furnished to the Supreme Court* of the United States. In all cases *not provided for by rule*, the district courts may regulate their practice in any manner *not inconsistent* with these rules." (Our emphasis).

In the Commentaries under the above Rule 83 is the following:

> "'The intention of the Committee was to provide a simple, *unified* system which would be governed by a *single*, brief *body* of rules. * * *. Daniel K. Hopkinson, *23 Marq. L. Rev. 159.*" (Our emphasis).

Present Local Rule 10 of this District Court, effective March 1, 1960 (formerly its **Local Rule 11** effective September 1, 1955), which is headed "Dismissal of Civil Actions Because of Lack of Prosecution" and which is the *only* Local Rule of this District Court on the *subject* of dismissal, reads, without change from the 1955 edition:

> "Civil cases in which *no action* has been taken for a period of *one year* may be dismissed *for want of prosecution* with judgment for costs *after thirty days notice* given by the clerk to the attorneys of record unless, for good cause shown, the court orders otherwise." (Our emphasis).

Neither the District Court nor the Court of Appeals' majority opinion sought to sustain the dismissal on the above **Local Rule 10**, nor could they, because the record

shows that during the *year* preceding the dismissal of October 12, 1960, the *defendant* had filed additional interrogatories to the plaintiff on March 11, 1960 and the plaintiff filed answers thereto on April 15, 1960, *so both sides have been active within the year.* (Record Appendix pp. 6(a), 8(a)).

Petitioner regards the above **Local Rule 10** as pertinent here under the doctrine that "the expression of one excludes the other".

Concise Statement of the Case.

The facts material to consideration of the questions here presented are very short and simple and are largely indicated already under the preceding headings "Questions Presented," and "Constitutional Provisions, Rules, etc. Involved".

Jurisdiction vested in the District Court under diversity of citizenship on the petitioner-plaintiff's complaint alleging severe and permanent personal injuries and praying damages exceeding the jurisdictional amount.

The Record Appendix contains a complete chronological list of the docket entries in the case in the District Court, plus all orders and other papers in the case since July 2, 1959, including the transcript of the *ex parte* pre-trial hearing of October 12, 1960 at which the Court dismissed the case. It shows:

Complaint was filed August 4, 1954. Defendant filed a motion for judgment on the pleadings on April 30, 1955, which motion the Court sustained November 30, 1955. Plaintiff appealed and obtained reversal with directions to vacate the judgment and proceed with the case. *Link* v. *Wabash Railroad Co.* (7 Cir. 1956) 237 F. 2d 1, certiorari

denied 352 U.S. 1003. Mandate went down to the District Court on March 13, 1957.

Without listing all the succeeding proceedings, they included an order of June 4, 1959 setting the case for trial on July 22, 1959. Then on July 2, 1959, an order was entered reciting "*At defendant's request*, to which request plaintiff agrees, trial of this case set for July 2, 1959 is *continued until further assignment* by the court. (Record Appendix p. 6(a)).

There never was any trial setting made in the case *at any time thereafter.* (Record Appendix p. 4(a)).

The only proceedings from that indefinite trial continuance on July 2, 1959 until the pre-trial conference and dismissal of October 12, 1960, consisted of the *defendant* filing additional interrogatories for plaintiff to answer on March 11, 1960, to which, after a granted extension, the plaintiff filed answers on April 15, 1960. (Record Appendix 4(a), 6(a), 8(a)).

The facts concerning the pre-trial conference of October 12, 1960, are recited sufficiently for present purposes in the Court of Appeals' majority opinion, 291 F. 2d at pp. 544-545; Appendix hereof, pp. 4a-5a. It recites that notice had been mailed to counsel on both sides on September 29, scheduling a pre-trial conference in the case for October 12, 1960 at 1 P.M., *pursuant to Local Rule 12* (above quoted at p. 4 hereof). Notice was received by counsel on both sides. On the *forenoon* of Wednesday, October 12, 1960, plaintiff's counsel called by telephone from Indianapolis (160 miles distant from the court in Hammond, Indiana) and asked the Judge's secretary for permission to talk with the Judge, but the latter was on the bench, so then plaintiff's counsel *asked her to convey to the Judge the following message* (which she did prior

to the hour of hearing), namely, that he was in Indianapolis—and that he was *busy preparing papers to file with the Indiana Supreme Court,* though he was not actually engaged in argument, "that he *couldn't* be here by 1 o'clock (Wednesday, October 12), but he *would* be here either Thursday afternoon (*one day later*) or any time Friday (two days later) if it could be re-set." She told plaintiff's counsel she would convey this message to the Court and opposing counsel which she apparently promptly did to both of them before the scheduled hour of 1 P.M. Defendant's counsel told the Court at the hearing that plaintiff's counsel had called him on the preceding morning (October 11) from Indianapolis and had then stated *he expected to be in court for the pre-trial.* He said the Judge's secretary conveyed to him the above message from plaintiff's counsel on the forenoon of October 12. The opinion next goes on to say:

> "The trial judge then reviewed the history of this ltigation and pointed out that plaintiff's counsel had notice of the hearing, did not appear for the hearing and had failed to indicate any 'reasonable reason' for not appearing. In view of *all the circumstances surrounding counsel's action in the case,* the *trial court concluded that it* should *'exercise its inherent power to dismiss* this action' upon 'failure of plaintiff's counsel to appear *at a pretrial* • • • counsel having failed to give any good and sufficient reason for not appearing *at the said pretrial'.* The case *was then dismissed."* (Our emphasis).
>
> 291 F. 2d 542, 545, first column.
> Appendix hereof, p. 5a.

It is clearly apparent from the above part of the opinion which directly quotes the District Judge, that the latter *predicated the dismissal solely and squarely upon his asserted "inherent power"* to dismiss this action, and also

that this power was *exercised solely because of the absence of plaintiff's counsel from the pre-trial hearing.* (We pass, for the moment, the secondary and probably not controlling question of whether the above-quoted charges by the Judge that plaintiff's counsel had failed to give any good and sufficient reason for not appearing, shows an arbitrary harshness in exercising his alleged "inherent power," in view of the previously recited facts).

Again, on the same page, the opinion in effect reiterates the above-quoted "inherent power" doctrine. The plaintiff-appellant had argued to the Court of Appeals that the *dismissal could not stand* because there had been *no motion by the defendant* for dismissal as required by *Rule 41(b)* of Civil Procedure, that the District Court had made the dismissal on its own motion (as is indicated in the last quotation, *supra*), and that the *dismissal could not stand on Local Rule 11* because both parties had been active in the case during the preceding year. (These rules are quoted at pp. 6-7 hereof). In response to these contentions, the majority opinion said:

> "Plaintiff argues that there was *no motion by defendant* for dismissal. *Since the trial court did not base its dismissal on Local Rule 11, supra, or on Rule 41(b),* Federal Rules of Civil Procedure, for want of prosecution, no such motion was required. It is quite clear to us that district courts have ample authority to '*regulate* their practice in any manner *not inconsistent* with' the Federal Rules of Civil Procedure, as provided in *Rule 83, supra. This case comes within the purview of that rule.*" (Our emphasis).

Final judgment was entered the same day, at the close of the pre-trial hearing dismissing plaintiff's case with prejudice (without a saving clause). It reads:

Order Book Entry: October 12, 1960

Pursuant to the inherent powers of the Court, and upon failure of plaintiff's counsel to appear at a pre-trial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, *the cause is now dismissed.*

Luther M. Swygert:
Judge

Record Appendix, p. 9a.

From this judgment this petitioner-plaintiff took his appeal by notice of appeal filed November 10, 1960, and by other procedures,—the validity of the appeal not being questioned.

Record Appendix, p. 9a.

ARGUMENT.

I.

Confronted by a simple situation where *no ground for involuntary dismissal* was authorized in *Rule 41(b)* of Civil Procedure or in the *Local Rule 10 (former No. 11)* on dismissal (pp. 6-7 *supra*), these courts below have *created their own undefined grounds* for dismissal, *outside the letter and spirit of the Rules of Civil Procedure* established by this Court. This, they have done by putting forth a confused doctrine which:

(a) Announces the doctrine that District Courts have "*inherent power*" to dismiss cases, *without* any Rule of Civil Procedure or any Local Rule *authorizing* dismissal in the given situation. (291 F.2d at p. 545, first column; Appendix hereof, pp. 5a-6a).

(b) They predicate this power upon *Rule 83* of Civil Procedures which authorizes "each district court" to make and amend *rules* governing its practice *not inconsistent* with these rules." Rule 83 requires that "*Copies of rules* and amendments so made by any district court *shall* upon their promulgation *be furnished to the Supreme Court of the United States*." But admittedly this District Court *had no local rule* authorizing this dismissal. The local rule on that subject *did not* authorize such a dismissal. (p. 7 *supra*). The *majority opinion frankly admits the lack of any authorizing rule* and states that the District Court did not base this dismissal on either the local rule or Rule 41(b) of Civil Procedure. (291 F.2d at p. 545, point3; Appendix hereof, p. 6a).

(c) Then they proceed to *distort and enlarge* the next and final sentence of *Rule 83*, which reads:

> "In all cases not provided for by rule, the district courts may *regulate* their practice in any manner *not inconsistent* with these rules." (291 F.2d at p. 545, second column, point 3; Appendix hereof, p. 6a).

The "inconsistency" and havoc which would be created in the Rules of Civil Procedure across the nation by this distortion permitting each district court to render final judgments of dismissal (or other equally important matters) under the guise of "regulating their local practice", *outside the Rules of Civil Procedure*, and *without* even a promulgated *local rule* to authorize it or to guide attorneys or safeguard litigants, *all unknown to the Supreme Court* until some victim of the unpublished "practice" comes up on certiorari,—is obvious.

(d) Next, the majority opinion reverts to the "inherent power" doctrine,—but this time it is enlarged to justify dismissals as "sanctions," imposed under no defined standards to enforce vague compliances (including necessarily an attorney's inability to get to a pre-trial conference on schedule as in this case. (291 F.2d 545, par. 4; Appendix hereof, p. 6a).

If this Court permits that majority opinion to stand, then the Rules of Civil Procedure, which represent great labor not only by this Court but by able and dedicated committees, will become a mockery, relied upon by lawyers and litigants, but actually subject to be nullified by any District Court at any time in any case, under this newly announced "inherent power" of each District Court to

"regulate its practice" (they ignore the plain and *necessary* purpose and intent of the words "not inconsistent with", though they do lip service to them by quoting them.)

"Regulate *what practice?*" The plain purpose of this language was to give the District Courts enough authority to handle minor local practice problems, which necessarily differ in different courts and parts of the country.

But not to cast aside the nationwide *Rule 41(b)* on the *major* subject of "Involuntary Dismissals" and the final judgments resulting therefrom, — often cases of large amounts and national importance.

If *this* Rule of Civil Procedure is subject to be nullified or evaded or modified at the will or whim of any District Court under the guise of "regulating its procedure", *which* of the Rules of Civil Procedure are *not* subject to be by-passed?

And if a District Court has a Local Rule covering the subject of *dismissal*, as this one had, what good is it if the Court can by-pass it and make up a different rule or "practice" on the spur of the moment?

This majority opinion in effect makes every District Court a self-governed barony, so far as procedure is concerned, only nominally under the Supreme Court's Rules of Civil Procedure.

Under the old Conformity Act, we at least had the protection of the settled state practice in the federal courts.

The resulting injustice, evils, confusion and depreciation of the Supreme Court's function, at least in procedural matters, are apparent without further elaboration.

Petitioner does not argue—nobody argues—against giving District Courts and all courts the "sanctions" neces-

sary to maintain respect and orderly procedure. The Rules of Civil Procedure spell out many sanctions appropriate to various situations. But nowhere in those Rules is there authorized or indicated such an abortive and arbitrary dismissal as this one, under the guise of a "sanction" for no reason except that plaintiff's counsel "had failed to indicate any reasonable reason" for not arriving. How could he speak for himself and give "reasonable reasons" in his absence?

There is no showing in the Record Appendix of proceedings in the District Court or in the majority opinion that the case was in any way delayed by counsel's *one day* delay in arrival. *The opinion admits that the case had previously been delayed during a two year period 1955-1957 by the District Court's error in granting judgment on the pleadings upon defendant's erroneous motion therefor* (291 F.2d at p. 543, second column; Appendix hereof, p. 2a). The defendant fought the plaintiff to the Supreme Court on that issue on its unsuccessful petition for certiorari. *That error of the District Court cost the plaintiff much money and his counsel much labor.* Yet the District Court, at the abortive, *ex parte* pre-trial hearing expressed some indignation and concern over the alleged inconvenience to the Court and defense counsel on account of plaintiff's counsel's delaying *one day*. (Rec. Append. 15a-16a). And both the Court and defense counsel joined in complaining about the *age* of the case, though their own errors had put much of the age on it. (Rec. Append. 11a, 14a).

While we do not think that alleged *fault* of plaintiff's counsel for being absent, is material to the main issue above, discussed, the admitted facts stated in the majority opinion show that no reasonable fault existed (291 F.2d at pp. 544-545; Appendix heerof, pp. 4a-5a).

The latter part of the majority opinion erroneously implies that at oral argument plaintiff's counsel "conceded" fault in not getting to the conference. (291 F.2d at p. 546, second column; Appendix hereof, p 8a). The Appellant's Brief in the Court of Appeals, which has come up here bound with the Record Appendix under that Court's practice shows that it contained a vigorous defense of counsel's *lack* of fault under a section headed "Adequate Showing of Inability of Plaintiff's Counsel to be Present" (p. 11 of brief). In oral argument we adhered to the same position. Why should the victim apologize? What the opinion apparently refers to is our answer to a *hypothetical* question from the bench,—*if* a plaintiff's attorney were at fault in not attending a hearing, what sanction should be imposed? Our answer was that *if* such a thing occurred, the court would have ample power to discipline the attorney as an *officer* of the court, but not to *dismiss* his client's case. Our position is the same now.

II.

This "inherent power" doctrine, wherein the District Court took the initiative and in effect dismissed the case *on its own motion*, as a supposed "sanction" imposed for the absence of plaintiff's counsel, had an unusual and probably unprecedented result:

Under all the existing dismissal rules, *the defendant's counsel could not have obtained this dismissal judgment*, at this pre-trial hearing, *without motion* or notice of motion for such dismissal.

Rule 41(b) of Civil procedure requires that for any failure of the plaintiff to prosecute or to comply with the Rules of Civil Procedure or any order, "*a defendant may move* for dismissal".

Local Rule 6(b) required generally and without qualification *that Motions to dismiss* must be accompanied by a supporting brief, with 15 days for an answer brief. (See quotation, p. 6 *supra*.)

The record shows that at no time, during or after the pre-trial hearing, did defense counsel file or serve a written motion to dismiss, *or even go so far as to make an actual oral motion to dismiss during the hearing.* The transcript of the hearing shows that the Judge took the initiative throughout the hearing. He merely asked defense counsel for his "thinking", and counsel (Mr. Bodle) "suggested" to the Judge that the latter had this "inherent power" to dismiss, but *refrained* from making any actual motion:

The Judge had called in his secretary to relate on the record her telephone call from plaintiff's counsel that forenoon, which she obviously had already reported the Judge before the hearing (see pp. 9-10 above, also Rec. Append. 12a-13a). The following then took place:

> "The Court: That is all, as you recall it, that was said?
>
> Miss Griffith: Yes sir.
>
> The Court: Thank you. Under the circumstances, what is *your thinking*, Mr. Bodle?
>
> Mr. Bodle: I would certainly *suggest* to the Court that *it has inherent authority to dismiss cases,* not only under its own local rule concerning prosecution, but it has *inherent power, without any specific rule,* by virtue of Federal Rule 83, and *the inherent power of the Court to dismiss* where the Court *thinks* it necessary under the particular *situations not provided for by any specific rule.* (Our emphasis).
>
> Rec. Append. 13a.

Then, after some further discussion, mainly consisting of the Judge and defense counsel joining in criticizing plintiff's counsel for not getting there and blaming him of the "age" of the case, the Judge *on his own motion,* dismissed the case and directed the Clerk to enter the dismissal judgment. (Rec. Append. 13-16a).

Thus it is clear as a matter of law that under all available dismissal rules (pp. 6-7 *supra*), *the defendant could not have moved for, and in fact did not move for a dismissal,* but *the Judge, taking the initiative throughout the hearing, ordered a dismissal in the absence of plaintiff's counsel,* without the latter *knowing* that any dismissal was impending or contemplated, and without so much as giving him an *opportunity to get back the next day and be heard* in opposition.

This is one illustration of the evils, injustices and abortive procedure which flow from this "inherent power" doctrine, derived from distorting the scope and purpose of Rule 83 of Civil Procedure.

The Courts have held that pre-trial *Rule 16* "confers *no special power of dismissal* not otherwise contained in the rules:"

> "In dismissing the action the district court *relied* upon *Rules 16 and 11(b)*, 28 U.S.C.A. Rule 16 appears to have been invoked on the theory that *dismissal at the pre-trial stage is proper where it* clearly appears that plaintiff *will be unable to* prove the allegations of its complaint. We hold, however, that *Rule 16 confers no special power of dismissal not otherwise contained in the rules.* • • •" (Our emphasis).
>
> *Syracuse Broadcasting Corporation* v. *Newhouse,* (2 Cir. 1958) 271 F. 2d 910, 914.

Even as to recalcitrant parties who were evading *orders* for discovery and the like (which did not occur in the present case), dismissal with prejudice was applied with great caution:

> "• • • Dismissal with prejudice is a *drastic sanction* to be applied only in *extreme* situations. *Gill* v. *Stolow*, 2 Cir., 1957, 240 F. 2d 669; *Producers Releasing Corp. de Cuba* v. *PRC Pictures*, 2 Cir., 1949, 176 F. 2d 93, and here the preclusion order seems an ample penalty for any lack of cooperation on plaintiff's part.
>
> We hold that *dismissal was improper.*" (Our emphasis).
>
> *Syracuse Broadcasting Corporation* v. *Newhouse*, (2 Cir. 1958) 271 F. 2d 910, 914.

> "• • • These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to *dismiss* an action *without affording a party the opportunity* for a hearing on the merits of his cause. • • •" (Our emphasis).
>
> *Societe International etc.* v. *Rogers* (1958) 78 S. Ct. 1087, 1094.

Viewing this peculiar, unnatural, abortive hearing and its unnecessary and unjust results, it seems to fall far short of the basic requirements of "due process of law" under the *Fifth Amendment*. This is why we said at page 4 *supra*, that we think it is optional with this Court to grant relief under the Fifth Amendment, along with a correction of the erroneous procedural concepts below:

> "In judicial proceedings, due process of law means law in *its regular course* of administration through courts of justice, in accordance with the fundamental principles of free government. • • • (our emphasis).
>
> 16A C.J.S., Constituted Law, Sec. 567, p. 541.

"The constitutional guaranty of due process of law is intended to protect the individual *against arbitrary exercise* of governmental power and secure to all equal protection of the law. It is a matter of substance, not of form, and does not guarantee against judicial error." (Our Emphasis)

16A C.J.S., Constitutional Law, sec 569, p. 559.

"Exericse of power. The due process clauses require that a power conferred by law be exercised *judiciously* with an honest intent to fulfill the purpose of the law, *and it is a part of the judicial function to see that the requirement is met.*" (Our emphasis).

16A C.J.S., Constitutional Law, sec. 569(3), p. 570.

None of the cases cited in the majority opinion are comparable with what occurred in this case, and none of them sustain the abortive procedure or the unjust result in this case.

Darlington v. *Studebaker-Packard Corp.*, (7 Cir. 1959) 261 F.2d 903, cited in the opinion at the bottom of p. 545, was where a case was dismissed under this same District Court's *Local Rule 11* (now renumbered as Rule 10) *after 30 days notice.* This Rule is quoted at p. 7 *supra. It is the same Local Rule 11 which the majority opinion says two paragraphs earlier is not involved in our case.* The short excerpt quoted from it is dictum. The point decided was that this Local Rule 11 was not inconsistent with the Rules of Civil Procedure, and hence was a valid local rule.

Wisdom v. *Texas Co.*, (D.C., N.D., Ala. 1939) 27 F. Supp. 992, 993, cited in the opinion at p. 546, involved a pre-

trial hearing, but the *defendant moved under Rule 41(b)* for dismissal for want of prosecution, which, as above shown, *the defendant did not do in this case.* Further the majority opinion says on the preceding page, point 3, that this *Rule 41(b) is not involved in our case.*

Dalrymple v. *Pittsburgh Consolidated Coal Co.*, (D.C. W.D. Pa. 1959) 24 F.R.D. 260, cited in the opinion at p. 546, is shown by the quoted excerpt to have involved "flagrant disobedience" of the court's rules, whereas there admittedly was *no rule disobeyed in our case.*

Likewise, it appears from the majority opinion's own descriptions and excerpts from its remaining cases cited at page 546, that none are in point with our facts and all seem to have involved *disobedience of orders* for which various sanctions were imposed.

The dissenting opinion of Judge Schnackenberg, (291 F.2d 547; Appendix hereof, p. 8a) is an able and sufficient discussion of the facts and law, sufficient in itself to demonstrate grossly wrong procedure and needless injustice inflicted upon tthe plaintiff. We have not discussed it in detail in this Petition, because it speaks for itself. We have endeavored to present additional points of law and fact.

Wherefore, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to bring up and review this case, whereupon the judgments below may be reversed, and for all other proper relief.

JAY E. DARLINGTON,
Attorney for Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

SEPTEMBER TERM, 1960—APRIL SESSION, 1961.

No. 13221
WILLIAM LINK,
Plaintiff-Appellant,
v.
WABASH RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

May 26, 1961.

Before HASTINGS, *Chief Judge,* SCHNACKENBERG and KNOCH, *Circuit Judges.*

HASTINGS, *Chief Judge.* This is an appeal by plaintiff from an order of the district court entered October 12, 1960 dismissing this cause of action for failure of plaintiff's counsel to appear in court for a pre-trial conference scheduled for hearing on that date.

The order appealed from reads:

> "Pursuant to the inherent powers of the Court, and upon failure of plaintiff's counsel to appear at a pre-trial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, the cause is now dismissed."

The history of this litigation is revealed by the record before us in this appeal.

On August 24, 1954, plaintiff William Link filed his complaint in the district court against defendant The Wabash Railroad Company to recover damages for injuries alleged to have been sustained by him when he drove an automobile into a collision with defendant's train standing across a highway in Indiana.

On September 17, 1954, defendant appeared and filed its answer to the complaint.

On September 17, 1954, defendant appeared and filed its answer to the complaint.

On April 30, 1955, defendant filed its motion for judgment on the pleadings. On October 18, 1955, hearing was had on this motion. On November 30, 1955, the district court granted defendant's motion for judgment on the pleadings and ordered the cause dismissed. From this order of dismissal plaintiff appealed. On October 10, 1956, our court reversed and remanded the case for trial. *Link* v. *Wabash Railroad Company*, 7 Cir., 237 F. 2d 1 (1956), cert. denied, 352 U.S. 1003 (February 25, 1957). On March 13, 1957, the mandate from this court was filed in the district court.

Subsequently, the trial court set the case for trial for July 17, 1957. On June 27, 1957, on motion of plaintiff and defendant not objecting, the trial date of July 17, 1957 was vacated; and the cause was continued.

On August 17, 1957, defendant filed interrogatories for plaintiff to answer.

On February 24, 1959, the trial court on its own initiative gave notice to the parties, pursuant to Local Rule 11,[1]

[1] Local Rule 11 of the United States District Court, Northern District of Indiana, effective September 1, 1955 (now Local Rule 10, effective March 1, 1960) reads:

"Dismissal of Civil Cases Because of Lack of Prosecution. Civil cases in which no action has been taken for a period of one year may be dismissed for want of prosecution with judgment for costs after thirty days notice given by the clerk to the attorneys of record unless, for good cause shown, the court orders otherwise." See, *Darlington* v. *Studebaker-Packard Corporation*, 7 Cir., 261 F. 2d 903, 905 (1959), cert. denied, 359 U.S. 992.

that the cause would be dismissed on March 25, 1959, unless the court ordered otherwise.

On March 24, 1959, plaintiff filed answers to defendant's interrogatories.

On March 25, 1959, hearing was had on the show cause order, and on June 4, 1959 the trial court entered an order retaining the case on the docket and setting it for trial for July 22, 1959.

On July 2, 1959, on defendant's motion, to which plaintiff agreed, the trial date of July 22, 1959 was vacated; and the case was continued.

On March 11, 1960, defendant filed additional interrogatories for plaintiff to answer. On April 15, 1960, after an extension of time granted by the trial court, plaintiff filed answers to the additional interrogatories.

On September 29, 1960, pursuant to Local Rule 12, effective March 1, 1960, the district court caused notice to be mailed to counsel for both parties scheduling a pre-trial conference in this case to be held in court on October 12, 1960, at 1:00 o'clock p.m.

It is undisputed that counsel for both parties received this notice of the pre-trial conference. It is undisputed that Local Rule 12 was in force at the times in question and was adopted pursuant to an order of the district court.

Local Rule 12 provides:

> "The court may hold pre-trial conferences in any civil case upon notice given to counsel for all parties."

Pre-trial procedure is authorized by Rule 16, Federal Rules of Civil Procedure, 28 U.S.C.A. Local rule making power generally in the district court is derived from 28 U.S.C.A. § 2071. Rul 83, Federal Rules of Civil Procedure, provides:

> "• • • In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

On October 12, 1960, at 1:00 o'clock p.m., the time fixed for the pre-trial conference, the district judge called this case for pre-trial hearing. Defendant's counsel were present in court. Plaintiff's counsel did not appear. At 3:00 p.m., plaintiff's counsel not having appeared, the district court entered the foregoing order of dismissal.

The transcript of the proceedings had in court preceding the entry of the order of dismissal reveals the following factual situation which is not disputed by plaintiff.

The district judge's secretary was called into court and requested by the court to make a statement. She said that she mailed notice of the pre-trial conference to all counsel on September 29, 1960. She gave the following report to the court:

> "He [plaintiff's counsel] called about 10:45 [on Wednesday, October 12, 1960], and said he was in Indianapolis—that he was busy preparing papers to file with the [Indiana] Supreme Court. He said he wasn't actually engaged in argument and that he couldn't be here by 1:00 o'clock, but he would be here either Thursday afternoon or any time Friday if it could be reset.
>
> "At first he asked to talk to you, but you were on the bench, and he then asked if I could convey this to you.
>
> "I asked him if he had contacted Mr. Bodle [defendant's counsel], and he said he had yesterday, and he said he couldn't be there, and I don't know, of course, if he meant for the pretrial or for the deposition."

She stated that she told plaintiff's counsel she would convey this message to the court and opposing counsel. She also reported that this was the oldest civil case on the court docket. It further appeared that this was the first and only attempt counsel made to have the pre-trial conference continued.

Defendant's counsel stated to the district court at this time that plaintiff's counsel called him on the preceding morning (October 11, 1960) from Indianapolis and stated that he expected to be in court for the pre-trial but did not know whether he would attend the taking of a deposition of plaintiff set for the next day. He further stated counsel said "he was doing some work on some papers." He said that was the extent of his contact with him "since the time the Court sent out its notice of the pretrial," which he received on Sepember 30, 1960. He had a call from the secretary of the district judge reporting the message telephoned to her on the day of the hearing from Indianapolis by plaintiff's counsel.

The trial judge then reviewed the history of this litigation and pointed out that plaintiff's counsel had notice of the hearing, did not appear for the hearing and had failed to indicate any "reasonable reason" for not appearing. In view of all the circumstances surrounding counsel's action in the case, the trial court concluded that it should "exercise its inherent power to dismiss this action" upon "failure of plaintiff's counsel to appear at a pretrial • • • counsel having failed to give any good and sufficient reason for not appearing at the said pretrial." The case was then dismissed.

Plaintiff first contends that the dismissal was erroneous because nothing was scheduled for hearing on October 12, 1960 except the pre-trial conference and that this "had not been set by any *order* of the court but by a 'pre-trial notice'" sent to counsel. We think this contention is without merit. The "notice" was sent pursuant to Local Rule 12 of the district court. Local Rule 12 had been promulgated by an order of the court. Certainly a notice sent pursuant to an order of the court embodied in a court rule does and should have all the force and effect of an order of the court. Further, plaintiff has not cited any authority requiring that a pre-trial conference be scheduled by a specific court order to give it validity. It is well settled that court rules have the force of law. *Weil* v. *Neary*, 278 U.S. 160, 169 (1929).

Plaintiff argues that there was no motion by defendant for dismissal. Since the trial court did not base its dismissal on Local Rule 11, *supra*, or on Rule 41(b), Federal Rules of Civil Procedure, for want of prosecution, no such motion was required. It is quite clear to us that district courts have ample authority to "regulate their practice in any manner not inconsistent with" the Federal Rules of Civil Procedure, as provided in Rule 83, *supra*. This case comes within the purview of that rule.

Plaintiff maintains that Local Rule 12, *supra*, providing for pre-trial conferences, contains no sanctions calling for dismissal, or otherwise, and that in the absence of a provision for such sanctions the trial court erred. It is sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures and to impose appropriate sanctions for failure to comply. The authorities are all to the contrary.

In *Darlington* v. *Studebaker-Packard Corporation*, 7 Cir., 261 F.2d 903, 905 (1959), cert. denied, 359 U.S. 992, where we upheld the dismissal of a cause under another local rule (for want of prosecution), we said that "• • • it is within the court's inherent power to so dismiss an action without authority of statute or rule," citing *Hicks* v. *Bekins Moving & Storage Co.*, 9 Cir., 115 F. 2d 406, 408, 409 (1940). On the general inherent power of a court to dismiss an action as a sanction for disobedience of a court order, see Annotation, 4 A.L.R. 2d 348.

Courts may exercise their inherent powers and invoke dismissal as a sanction in situations involving disregard by parties of orders, rules or settings. *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & E. Co.*, 8 Cir., 245 F. 2d 613, 628 (1957), cert. denied, 355 U.S. 871; *Refior* v. *Lansing Drop Forge Co.*, 6 Cir., 124 F. 2d 440, 444 (1942), cert. denied, 316 U.S. 671. In the recent case of *Jameson* v. *DuComb*, 7 Cir., 275 F. 2d 293, 294 (1960), this court upheld a dismissal because of the failure of plaintiff to be present at the trial on the date previously set for the trial. The court there found no abuse of discretion on the part of the trial court. As the court pointed out in

Refior, supra, 124 F. 2d at 444, "Every litigant has the duty to comply with the reasonable orders of the court and, if such compliance is not forthcoming, the court has the power to apply the penalty of dismissal." See also, *Joseph* v. *Norton Company*, D.C.S.D.N.Y. 24 F.R.D. 72 (1959), affirmed, 2 Cir., 273 F. 2d 65 (1959).

The sanction of dismissal has been imposed for failure to comply with pre-trial settings. *Dalrymple* v. *Pittsburgh Consolidated Coal Company*, D.C.W.D.Penn., 24 F.R.D. 260 (1959); *Wisdom* v. *Texas Co.* D.C.N.D.Ala., 27 F. Supp. 922 (1939). In *Wisdom, supra*, plaintiff failed to appear at the pre-trial hearing; and the court dismissed the case, on motion of defendant, for failure to prosecute the action and for failure to comply with the Federal Rules of Civil Procedure, pursuant to Rule 41(b) of such rules. In 5 Moore's Federal Practice, p. 1038, note 15 (2d ed.), it is said that the dismissal in *Wisdom* "could also be regarded as a dismissal for failure to comply with an order of the court * * *." In *Dalrymple, supra*, 24 F.R.D. at page 262, the court noted that its local pre-trial rule was promulgated under Rules 16 and 83, Federal Rules of Civil Procedure, and said that the local rule "was designed to promote the expeditious processing of civil litigation * * *" "But unless appropriate sanctions are firmly imposed by the court for flagrant disobedience of its orders, the salutary purpose of [the local rule] will be entirely frustrated and the progress of litigation in this district hopelessly impeded."

Plaintiff argues that there was adequate showing of the inability of his counsel to be present at the pre-trial conference. We disagree. His brief refutes this contention wherein he states, "Plaintiff's counsel has *previously* become engaged in an important matter in the *Indiana Supreme Court*, not oral argument but preparing urgent papers of some kind, which required him to be in *Indianapolis*. As often happens in law work, the task took longer then expected, so that it occupied the day which had been set for this pre-trial conference * * *." With knowledge of the time and place of the pre-trial hearing, plaintiff's

counsel chose to complete his out-of-court work and called the district court and so advised it. In our opinion, this falls far short of being a legitimate excuse for failing to appear in court at the time fixed.

Plaintiff contends that the sanction of dismissal is unnecessarily harsh. In oral argument his counsel conceded that the district court might have disciplined him by imposing a lesser sanction. Many of the cases herein cited demonstrate that the character or degree of the sanction is within the discretion of the trial court. Under the circumstances of this case we find no abuse of discretion on the part of the trial court is dismissing the action.

Finally, in oral argument, plaintiff's counsel urged that his client should not be made to suffer a dismissal because of counsel's failure in this matter. The short answer to this is that the action or lack of action on the part of counsel is that of his client.

Pre-trial procedure has become an integrated part of the judicial process on the trial level. Courts must be free to use it and control and enforce its operation. Otherwise, the orderly administration of justice will be removed from control of the trial court and placed in the hands of counsel. We do not believe such a course is within the contemplation of the law.

We find no error in the dismissal of this cause by the district court. The order of dismissal appealed from is affirmed.

AFFIRMED.

No. 13221

SCHNACKENBERG, *Circuit Judge*, dissenting.

I take as my text this 1952 pronouncement of the Supreme Court of New Jersey:

> "The *dismissal of a party's cause of action* is drastic punishment and should not be invoked except in those cases where the actions of the *party* show a

deliberate and contumacious disregard of the court's authority. * * * It seems to us that the plaintiff's conduct here did not warrant such severe punishment, particularly in view of the fact that the defendant would have suffered no loss by a further short adjournment which very well might have been granted on terms.

"* * * But courts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full untilzation of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of *as their paramount objective.* * * *"* (Italics supplied).

Allegro v. *Afton Village Corp.*, 87 A.2d 430, 432.

In this case there was an absence of the usual grounds for the involuntary dismissal of a suit. For instance there cannot be a serious contention that plaintiff's suit was vexatious or fictitious, 27 C.J.S. 403. We had already held in *Link* v. *Wabash R. R. Co.*, 237 F.2d 1, that his complaint stated a cause of action and we had remanded the case to the district court for trial. The United States Supreme Court denied *certiorari*, 352 U.S. 1003.

Defendant's counsel makes no effort to rely upon want of prosecution as a ground for the involuntary dismissal. Obviously defendant is in no position to make such a contention, inasmuch as it caused the district court to vacate the order setting the case for trial on July 22, 1959, and continue the case. Even if it had not done so, it is clear that its acquiescence in the delay would bar a dismissal of plaintiff's case for want of prosecution. 27 C.J.S. 445.

Therefore, there exists no basis for sustaining the dismissal order from which plaintiff has appealed, unless it is shown that there has been a disobedience by plaintiff of a court order. 27 C.J.S. 406. There is no such showing, because, first, there was no order commanding plaintiff

to do anything and hence no possibility of his being disobedient, and, secondly, there is no evidence that the plaintiff even had any knowledge of the proceedings which the trial court described as its exercise of "its inherent power to dismiss this action" upon "failure of plaintiff's counsel to appear at a pretrial * * *".

It is unnecessary to discuss the rationale of the holding that a pretrial conference was called in accordance with rules and that plaintiff's counsel did not appear. Certainly there is no suggestion that plaintiff was ever ordered or ever requested to appear at such a conference. His counsel was requested to do so and did not appear because, as he informed the judge's secretary, he was engaged in some activity in connection with business before the Indiana Supreme Court, at which time he requested a delay of a day or two for the conference. This message was conveyed to the trial judge. It further appears that plaintiff's counsel had informed defendant's counsel the preceding morning of his absence at Indianapolis.

On this showing the court dismissed plaintiff's case.

If one accedes to the proposition that plaintiff's counsel, despite his commitment at Indianapolis, should have been in attendance at the pretrial conference, and that his absence from the conference was inexcusable and made him amenable to discipline as an officer of the court, it is impossible to logically bridge the gap and to inflict disciplinary punishment upon his client rather than upon the attorney. The cause of action of the plaintiff for serious and permanent personal injuries and loss of earnings has been by the action of the court dismissed, not for any violation of any order by the plaintiff, but for an alleged dereliction by a lawyer who was held out to the plaintiff as one to whom he could entrust the handling of his case in the federal courts. It must be remembered that the attorney had been practicing for years in both the district court and this court of appeals.

The order now affirmed has inflicted a serious injury upon an injured man and his family, who are innocent of any wrongdoing. Plaintiff's cause of action, bearing the stamp of approval of this court, was his property. It has been destroyed.[1] The district court, to punish a lawyer, has confiscated another's property without process of law, which offends the constitution. A district court does not lack disciplinary authority over an attorney and there is no jusitfication, moral or legal, for its punishment of an innocent litigant for the personal conduct of his counsel. Because it was neither necessary nor proper to visit the sin of the lawyer upon his client, I would reverse.

[1] 28 U.S.C.A. Rule 41 (b).

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Friday, May 26, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

WILLIAM LINK,
Plaintiff-Appellant,

No. 13221 vs.

WABASH RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court entered therein on October 12, 1960, in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, June 21, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

WILLIAM LINE,
Plaintiff-Appellant,

No. 13221 vs.

WABASH RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

It Is Ordered by the Court that the appellant's petition for a rehearing of this cause be, and the same is hereby, DENIED.

(SCHNACKENBERG, *C.J.* voted to grant appellant's petition for rehearing)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 422

WILLIAM LINK,

Petitioner,

vs.

WABASH RAILROAD COMPANY,

Respondent.

N PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Wabash Railroad Company respectfully prays that the Petition for Writ of Certiorari be denied, and submits herein matters and grounds why the cause should not be reviewed by this Court.

QUESTIONS PRESENTED.

Whether the trial court had, and properly exercised, power to dismiss the cause upon failure of plaintiff to appear through counsel at a pretrial conference set pursuant to notice under a local rule, where plaintiff's counsel

intentionally remained in another, distant city to complete unrelated out-of-court work on the scheduled date, and first advised the court of his intention not to appear at the scheduled time and place by telephone two and a quarter hours before the scheduled time.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

1. Respondent submits that no constitutional provisions or questions are involved or presented.

2. Rules 16, 41(b) and 83 of the *Federal Rules of Civil Procedure for the United States District Courts*, and Rule 12 of the *Rules of the United States District Court for the Northern District of Indiana, Effective March 1, 1960*, all set forth in the petition herein, are involved.

STATEMENT OF THE CASE.

Respondent submits the following, pursuant to Rule 40(3) of the Supreme Court of the United States, in order to correct what respondent believes are material errors and omissions in petitioner's argumentative "statement" of the case, and in order to furnish a correct and concise statement of the material facts:

This was a personal injury case arising out of plaintiff's collision with defendant's train at a public crossing. Upon a prior appeal, action of the District Court in dismissing the complaint for failure to state a claim was reversed. No question in petitioner's 1961 appeal was predicated upon the questions presented by the previous appeal.

Subsequent to the mandate upon the previous appeal, the case had been set for trial July 17, 1957; on June 27, 1957, on motion of the plaintiff, defendant not objecting, a continuance was entered. (R. 1a; also R. 3a, entries

headed "6-21-57" and "6-27-57.") On August 17, 1957, the defendant filed interrogatories addressed to the plaintiff, with certificate of service attached. (R. 2a, line 1, and R. 3a, entry headed "8-17-57.")

On February 24, 1959, the Court gave notice that the cause would be dismissed March 25, 1959, for failure to prosecute, pursuant to a local rule, unless otherwise ordered. On March 24, 1959, plaintiff filed answers to the 1957 set of interrogatories. After various intervening arguments, motions and briefs, the Court entered an order on June 4, 1959, retaining the case on the docket, and at the same time set the case for trial July 22, 1959. On July 2, 1959, at defendant's request, to which plaintiff agreed, the case was continued until further assignment. (R. 2a, and R. 3a-4a, entries headed "2-24-59" through "7-2-59.")

On March 11, 1960, the defendant filed further interrogatories addressed to plaintiff. After being granted an extension of time, plaintiff filed answers to these interrogatories, other than interrogatory 3, which was not completely answered. (R. 4a, entries headed "3-11-60" through "4-15-60"; R. 8a.)

On September 29, 1960, notice of a pre-trial conference to be held October 12, 1960, was sent out (R. 14a), and on October 12, 1960, upon failure of plaintiff's counsel to appear, the order of dismissal here involved was entered. (R. 4a, 9a and 16a.)

Thereafter, on November 10, 1960, plaintiff filed his notice of appeal. On November 28, 1960, at plaintiff's request, a conference was held with the trial court, but nothing was brought before the court by the plaintiff and the conference terminated. (R. pp. 4a-5a.)

The dismissal was affirmed on appeal, and as shown at p. 2 of petitioner's petition herein, certiorari was sought

on the ninetieth day following the Court of Appeal's denial of rehearing.

The events of October 12, 1960, on which date the dismissal was entered, are accurately summarized in the Court of Appeals' decision sustaining the dismissal (291 F. 2d at 544, 545; pp. 4a-5a of Appendix to Petition), as suggested at p. 9 of the Petition. Respondent of course does not accept the argumentative portions of Petitioner's "statement," interspersed throughout it and especially following its reference to the Court of Appeals' factual summary, as being in any way proper to a statement of facts.

ARGUMENT.

Introduction.

UNDER RULE 19 OF THE SUPREME COURT, THE RECORD AND PETITION ESTABLISH NO REASON FOR GRANTING CERTIORARI.

The decision of the Court of Appeals as to which petitioner herein seeks certiorari involved nothing more than *application of well-recognized and commonly applied rules of law as to a trial court's power and discretion in the involuntary dismissal of actions, to the particular factual situation of the case.* The decision accordingly presents no question of importance to persons other than the immediate parties to the particular action and respondent respectfully submits that under the tests laid down by Rule 19 of the Supreme Court of the United States, no reason exists for the granting of the petition for certiorari herein.

Nor does the petition herein establish any such basis for granting review. The petition seems to be based principally on the patently false contention that Rule 41(b) of the Federal Rules of Civil Procedure has taken away all powers of the district courts to dismiss cases of their own motion. A subsidiary contention of petitioner, adapted from the dissenting opinion in the Court of Appeals' decision herein, is that a lawyer's acts or omissions in prosecuting (or failing to prosecute) a lawsuit are not imputable to his client.

The authorities are to the contrary, as documented in succeeding portions of this brief. Respondent submits respectfully that the petition herein should be denied.

1.

DISREGARD OF THE PRETRIAL SETTING, WHICH RESULTED IN THE DISMISSAL, STANDS AGAINST A BACKGROUND OF PETITIONER'S GENERAL LACK OF DILIGENCE.

The tone and color of this case at the trial court level can at least be suggested by a review of the record herein. This record shows that plaintiff-petitioner never took any action whatever to advance this case, after its return to the trial court docket in March, 1957. It should be noted that the matters which petitioner declines to discuss at page 9 of the present petition ("Without listing all the succeeding proceedings * * *") dealt mostly with *proceedings on the court's own motion*, during the period February 24-June 4, 1959, *to dismiss this cause for plaintiff-petitioner's failure to take action for over one year.* (R. 2a, 3a-4a.) The case was retained on the docket, but plaintiff still never took any subsequent action, other than to belatedly answer further interrogatories. Hence when plaintiff-petitioner's counsel *deliberately stayed on in Indianapolis*, on the day set for the pretrial, on unrelated out-of-court work, and made no effort to notify the court of this deliberate action until slightly more than two hours before the time set for the pretrial in Hammond (the two cities being, as petitioner states at page 11, some 165 miles apart), the action of the trial court in then dismissing the action, for failure of plaintiff's counsel to comply with the pretrial setting, obviously was not a sanction imposed against a previously diligent party or counsel.

2.

THE PRETRIAL CONFERENCE IN QUESTION WAS DULY AUTHORIZED AND VALIDLY SCHEDULED.

It is undisputed that the pretrial conference in question was scheduled, and notice thereof was given, pursuant to valid rules and procedures of the trial court. The Court of Appeals, in its decision affirming the dismissal herein, summarized these threshold matters adequately at 291 F. (2d) 544 (App. 3a-4a).

3.

THE DISMISSAL BY THE TRIAL COURT, ON ITS OWN MOTION, WAS WITHIN ITS GENERAL OR INHERENT POWERS, AS RECOGNIZED BY RULE 83; THERE WAS NO NEED FOR A DEFENSE MOTION UNDER RULE 41(b).

Petitioner's basic contention apparently is that the trial court had no power to impose sanctions for the deliberate disregard of the pretrial setting, except upon motion made by the *defendant* under Rule 41(b). The Court of Appeals properly disposed of this theory in its decision in the instant case, as follows:

> "Plaintiff argues that there was no motion by defendant for dismissal. Since the trial court did not base its dismissal on Local Rule 11 (N. D.—pertaining to dismissal after delays of one year) or on Rule 41(b), Federal Rules of Civil Procedure, for want of prosecution, no such motion was required. It is quite clear to us that district courts have ample authority to 'regulate their practice in any manner not inconsistent with' the Federal Rules of Civil Procedure, as provided in Rule 83 * * * This case comes within the purview of that rule." (291 F. (2d) at 545.)

In support of this position, see *Janousek* v. *French*, 287 F. (2d) 616 (8th Cir., 1961). There the action was dismissed upon plaintiff's failure to appear when the case

was reached on call of the trial calendar. Without formal motion by the defendant, the action was dismissed. The Eighth Circuit treated the failure to appear pursuant to peremptory call as being a failure to diligently prosecute, and in discussing Rule 41(b) stated:

> "Although the rule authorizes dismissal on motion of defendant, *it is a cardinal principle of law that the court may dismiss on its own motion*, for Rule 41(b) expressly recognizes and incorporates the inherent power of courts to dismiss actions for lack of diligence in bringing them to trial * * *" (287 F. 2d at 620; italics added.)

Otherwise expressed, Rule 41(b) makes it plain that a defendant may move the trial court to exercise these powers, if the trial court does not exercise them on its own initiative.

And, of course, Rule 41(b) carries within itself express recognition that there are other types of dismissals "not provided for in this rule * * *"

The power of a district court to exercise its inherent powers and enter dismissals in situations (such as the present) involving disregard of its orders, rules or settings is well documented in the opinion of the Court of Appeals herein, in 291 F. (2d) at 545-546. As stated by the Court of Appeals in this connection,

> "It is sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures and to impose appropriate sanctions for failure to comply. The authorities are all to the contrary." (291 F. 2d at 545.)

Petitioner has been unable to cite any authority in support of his position. It is abundantly clear that the trial court herein had clear and ample power to enter the dismissal, as it did, under its "inherent powers," and "upon

failure of plaintiff's counsel to appear" at the pretrial (R. 9a), without need for a defense motion under Rule 41(b).

(Petitioner has argued at p. 22 of his petition that the cases cited by the Court of Appeals, in its opinion affirming the dismissal herein, involved disobedience of rules and orders, and asserts that no disobedience of a "rule" or "order" was involved here. Apparently this assertion is based on the fact that the notice of the pretrial was called a "*notice*" and not an "*order.*" This thin semantic distinction has been adequately dealt with by the Court of Appeals herein:

> ("The 'notice' was sent pursuant to Local Rule 12 of the district court. Local Rule 12 had been promulgated by an order of the court. Certainly *a notice sent pursuant to an order of the court embodied in a court rule does and should have all the force and effect of an order of the court.* Further, plaintiff has not cited any authority requiring that a pre-trial conference be scheduled by a specific court order to give it validity. *It is well settled that court rules have the force of law.* *Weil* v. *Neary* 1929, 278 U. S. 160, 169, 49 S. Ct. 144, 73 L. Ed. 243." 291 F. (2d) 545; italics added.)

4.

SUMMARY DISMISSAL FOR DISREGARD OF PRETRIAL PROCEDURES IS A PROPER SANCTION; NOR DID IT FORECLOSE PETITIONER FROM BRINGING OTHER EXPLANATORY FACTS BEFORE THE TRIAL COURT IF ANY EXISTED.

The sanction of dismissal may be summarily imposed where there is a failure to comply with a scheduled date for a pretrial conference. Thus in *Wisdom* v. *Texas Co.*, 27 F. Supp. 992, where plaintiff's attorney had been notified of a pretrial conference, and failed to appear, the opinion shows that dismissal was entered forthwith. Like-

wise in *Dalrymple* v. *Pittsburgh Consolidation Coal Company*, 24 F. R. D. 260 (W. D. Pa. 1959), where plaintiff's attorney appeared at pretrial but was totally unprepared to proceed, dismissal was again entered on the pretrial date. And in *Blue Mountain Construction Company* v. *Werner*, 270 F. (2d) 305 (9th Cir., 1959), cert den. 361 U. S. 931, where plaintiff's counsel failed or refused to appear for a duly scheduled pretrial, the court dismissed the action with prejudice without further proceedings (although the formal judgment apparently was entered on a later day).

Dismissal without notice, on the court's own motion, in the analogous situation of failure to prosecute diligently, was held not to contravene "any sustainable concept of due process," in *Shotkin* v. *Westinghouse Electric & Mfg. Co.*, 169 F. (2d) 825, 826 (10th Cir., 1948).

Although petitioner's counsel complains that he was given no opportunity to explain his absence, it should be noted that *he had already stated his position by telephone before the scheduled hour for the pretrial; and, most significantly, he never took any steps to bring any additional facts before the trial court*, by motion for relief under Federal Rule 60(b) or otherwise. The record shows that plaintiff-petitioner's counsel obtained a conference with the trial court on November 28, 1960, but *brought no motion before the court*, and the conference terminated without anything having been presented "upon which the court might act." (R. 5a.) Obviously plaintiff's counsel *had no additional facts or excuses to present*.

5.

THE UNDISPUTED FACTS AFFIRMATIVELY SHOW LACK OF GOOD CAUSE FOR DISREGARD OF PRETRIAL RULE AND SETTING; HENCE TRIAL COURT WAS WITHIN ITS DISCRETIONARY POWERS IN DISMISSING CASE.

As stated by the Court of Appeals herein, the undisputed facts of record herein show that

> "With knowledge of the time and place of the pretrial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it * * *" (291 F. 2d at 546.)

As further stated by the Court of Appeals,

> "* * * this falls far short of being a legitimate excuse fo failing to appear in court at the time fixed." (291 F. 2d at 546.)

It is not an abuse of discretion for a court to dismiss an action even where plaintiff's failure to respond to a court rule was due to pressure of counsel's trial commitments in other courts:

> *Darlington* v. *Studebaker-Packard Corporation*, 261 F. (2d) 903, 905 (7th Cir., 1959), cert. den. 359 U. S. 992, 3 L. Ed. (2d) 980;
>
> *Rooney* v. *City of East Chicago et al.*, 129 Ind. App. 128; 148 N. E. (2d) 842, 844 (1958).

Petitioner's counsel, having participated in both of the above-cited cases, is certainly familiar with this rule.

To the same effect is *Ledwith* v. *Storkan*, 2 F. R. D. 539 (D. Neb., 1942), refusing relief under Rule 60(b) where the allegation was that defendant's attorney was engaged in other business, and was out of the jurisdiction of the court. The decision contains discussion of analogous cases from a number of other jurisdictions.

6.

RULE THAT "LACK OF ACTION ON THE PART OF COUNSEL IS THAT OF HIS CLIENT" ANSWERS OTHER ARGUMENTS OF PETITIONER, AND JUDGE SCHNACKENBURG'S DISSENT.

Petitioner, at page 17 of his petition, and Judge Schnackenburg in his dissent at 291 F. (2d) 547, state without citation of authority that the faults or omissions of a lawyer should not be imputed to his client. But the law clearly is to the contrary. The general principles are stated in 7 *C. J. S., Attorney and Client*, sec. 67, pp. 850-851, as follows:

> "The relation of attorney and client is one of agency, that is, the attorney is the agent of the client * * *. Thus, the *client is bound*, according to the ordinary rules of agency, by the acts of the attorney within the scope of the latter's authority. *In general, whatever is done in the progress of the cause by such attorney is considered as done by the party, and is binding on him* * * *"
>
> "In general, the *omissions*, as well as commissions, of an attorney are to be *regarded as the acts of the client whom he represents*, and *his neglect is equivalent to the neglect of the client himself.*" (Italics added.)

The attorney is regularly summoned to court for arguments, hearings, pretrials—not as an individual, but as the agent and representative of his client. The courts operate through attorneys, acting for their clients—and not just as messengers, but as representing and standing in the shoes of their clients.

The law of Indiana, if not controlling, is at least instructive as to locally-prevailing standards. The rule is strictly followed in Indiana that the acts and omissions of an attorney in litigation are those of the client: *Ferrara*

v. *Genduso*, 214 Ind. 99, 14 N. E. (2d) 580 (1938) (which also discusses a number of earlier Indiana cases applying this rule); *Mockford* v. *Iles*, 217 Ind. 137, 145, 26 N. E. (2d) 42 (1940); *Kuhn* v. *Indiana Ice & Fuel Company*, 104 Ind. App. 387, 11 N. E. (2d) 508 (1937).

Thus, as the Court of Appeals correctly stated in affirming the dismissal herein, "* * * the short answer * * * is that the action or lack of action on the part of counsel is that of his client." 291 F. (2d) at 546.

7.

PETITIONER'S AUTHORITIES FAIL TO SUSTAIN HIS POSITION OR TO ESTABLISH REASONS FOR REVIEW.

Petitioner has cited no authorities contrary to respondent's position herein. Of the few authorities cited by petitioner, he appears to rely most heavily on *Syracuse Broadcasting Corporation* v. *Newhouse*, 271 F. (2d) 910 (2d Cir., 1958), which he cites first for the proposition that "Rule 16 confers no special power of dismissal not otherwise contained in the rules." *In context* (271 F. 2d at 914), this statement was made immediately after the Court of Appeals' statement that the trial court had invoked Rule 16

> "* * * on the theory that dismissal at the pretrial stage is proper where it clearly appears that plaintiff *will be unable to prove the allegations of its complaint.*" (Italics added.)

The appellate opinion then properly pointed out that defendant's motion to dismiss on this ground should have been disposed of under the *summary judgment* procedure established by Rule 56. This in no way implies that a court cannot *impose sanctions for disregard of pretrial procedures;* in fact the decision goes on to *hold specifically that this would be proper*, but points out that under the particular facts the trial court did not regard plaintiff's

conduct "* * * as sufficiently contumacious in and of itself to justify dismissal * * *" (271 F. 2d at 914.) Thus this case is consistent with respondent's position herein.

In addition to the cases already cited (section 4, *supra*) in which failure to comply with pretrial procedures under Federal Rule 16 resulted in dismissal, see *Package Machinery Company* v. *Hayssen Manufacturing Company*, 164 F. Supp. 904, 909 (E. D. Wis., 1958), affirmed in 266 F. (2d) 56 (7th Cir., 1959).

Petitioner then quotes the *Syracuse Broadcasting* case again, with internal citation of two additional cases, for the general proposition that dismissal is a "drastic sanction." Suffice it to say that in both of the internally-cited cases (*Gill* v. *Stolow*, 240 F. 2d 669, 2d Cir., 1957, and *Producers Releasing Corp. de Cuba* v. *PRC Pictures*, 176 F. 2d 93, 2 Cir., 1949), *personal illness* of the defaulted parties was demonstrated, upon appeal.

The case of *Societe Internationale* (*etc.*) v. *Rogers*, 357 U. S. 197, 2 L. Ed. (2d) 1255, cited by petitioner on the same general subject, involved a situation where plaintiff made repeated good-faith efforts to comply with a production order, but was deterred by fear of foreign criminal prosecution if it complied—a far cry from the present situation.

These are all of the cases relied upon by petitioner. Neither these cases, nor the general *C. J. S.* quotations added by petitioner at pp. 20-21, establish any basis upon which certiorari could or should be granted herein.

The only case cited in Judge Schnackenburg's dissent (291 F. 2d at 547) is *Allegro* v. *Afton Village Corp.*, 9 N. J. 156, 87 A. (2d) 430, where, under a particular set of facts involving delay caused by confusion over obtaining new counsel, after withdrawal of plaintiff's original counsel, the majority of the court (Chief Justice Vander-

bilt dissenting) felt that dismissal was not reasonable under the circumstances. Thus there is no factual similarity to the instant case.

No abuse of discretion by the trial court in this case has been demonstrated, and under the facts here present, there was none.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel of Record for Respondent.

GEORGE T. SCHILLING,
JOHN F. BODLE,
Of Counsel.

IN THE

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BRIEF FOR PETITIONER.

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WILLIAM LINK,

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BRIEF FOR PETITIONER.

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The above named Petitioner respectfully submits the following Brief supporting his prayer for this Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit affirming a final judgment of the United States District Court for the Northern District of Indiana which dismissed this petitioner-plaintiff's civil action for damages for personal injuries (without trial).

Opinions Below.

The opinions of the Court of Appeals, set forth in the Transcript of Record, pp. 17-26, is reported in:

Link v. *Wabash Railroad Co.* (C.A. 7, 1961) 291 F. 2d, 542 (Judge Schnackenberg dissenting with opinion at p. 547).

No opinion was filed by the District Court.

Grounds for Invoking This Court's Jurisdiction.

This Court's general jurisdiction to review final judgments of the Courts of Appeals in civil cases is invoked.

The Court of Appeals rendered its opinion and judgment of affirmance on May 26, 1961, (R. 17), following which a timely petition for rehearing by this petitioner-plaintiff was entertained and denied on the merits on June 21, 1961. (R. 28). Petition for writ of certiorari was filed on the ninetieth day thereafter, September 19, 1961, and was granted by this Court's order of November 20, 1961. (R. 29). Counsel for Petitioner received the printed Record from the Clerk pursuant to Rule 36(5) on December 28, 1961, and this Brief is filed 30 days thereafter under Rule 41(1).

This Court's jurisdiction is based upon 28 U.S.C. 1254(1).

Constitutional Provisions, Rules, etc. Involved.

No statute, federal or state, is involved in the present Petition.

In order to show the applicability of the following *Fifth Amendment* and *Rules*, it seems proper to state very briefly here, the nature of the case and the questions involved: The Petitioner-plaintiff's action for personal injuries was

dismissed with prejudice (and thereby destroyed) by the District Court, *on its own motion*, solely for the failure of Petitioner's counsel to appear at a *pre trial hearing* (said counsel having previously informed the Court and opposing counsel of his unforeseen inability to attend at the scheduled time, but offering and requesting to appear for the conference on *the next day* or any time thereafter). This dismissal was *based* in the District Court and was *affirmed* by the Court of Appeals' majority opinion, *not by authority* of any *Rule of Civil Procedure* or any *Local Rule* authorizing such dismissal. The dismissal was based solely upon the *doctrine* that District Courts have an undefined "*inherent power*" to *dismiss* cases with prejudice as a "sanction", to be imposed upon plaintiffs in this and other undefined situations, in the District Court's "discretion", *in the absence of any Rule* authorizing the dismissal, and in the *absence of any order in the case* violated by the plaintiff or his counsel, and in the *absence of any motion by defendant* for the dismissal. (See pp. 21-23 *infra*).

The constitutional provision involved is that part of the *Fifth Amendment* to the Constitution of the United States, reading:

> "No person shall • • • be deprived of life, liberty, or *property*, without *due process* of law; • • •" (Our emphasis)

Petitioner believes that the alleged arbitrary assumption of "inherent power" by the District Court to make the dismissal in this case, approved by a 2 to 1 majority of the Court of Appeals (291 F. 2d 545-546, points 3-5; R. 21-22), is sufficiently serious from a standpoint of orderly and responsible administration of justice in the District Courts, so that it would be in the public interest for this Court to treat this review on the basis of a denial of Petitioner's

constitutional rights, rather than on a basis of mere procedural error, although we think the latter basis for review is available to this Court in this case and that reversal could properly be predicated upon either ground or on both grounds.

The only Rules *directly* involved in this review are the following **relating to pre-trial conferences**. First, is the **District Court's Local Rule 12** which, without adding anything to the Rules of Civil Procedure on that subject, provides:

> "*Pre-Trial Conferences.*
>
> "The court *may* hold pre-trial *conferences* in any civil case upon *notice* given to counsel for all parties." (Our emphasis). (Effective March 1, 1960).

The above is simply a local application of **Rule 16 of Civil Procedure**, which reads

> "*Rule 16. Pre-Trial Procedure; Formulating Issues.*
>
> "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a *conference* to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an order which recites the *action taken at the conference*, the amendments allowed to the pleadings, and the agreements made by the

> parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions." (Our emphasis)

The District Judge *made* the dismissal, and the majority opinion of the Court of Appeals *upheld* it, on the doctrine of the District Court's supposed "*inherent power*" to make such dismissals *outside the Rules* of Civil Procedure and outside its own Local Rule on the *subject* of dismissals. (See opinion at 291 F. 2d 542, 545-546, points 3-5; R. 21-22; and Argument hereof, at pp. 17-23 *infra*).

Nevertheless, *the Rule of Civil Procedure governing involuntary dismissals is pertinent to our Petition* because we contend that it *defined* and made *uniform* the *powers* and *procedure* of District Courts on the *subject* of dismissals,—not to be overridden by local rules, still less to be overridden by some asserted and *undefined* "*inherent power*" of a District Court to dismiss even outside of the local rule.

Rule 41(b) of Civil Procedure provides:

> "(b) Involuntary Dismissal: Effect Thereof. For *failure of the plaintiff to prosecute* or to comply with these rules or any order of court, *a defendant may move for* dismissal of an action or any claim against him • • •" (Our emphasis).

In conjunction with the language of *Rule 41 (b)*, last quoted, *requiring a motion by the defendant* as a *basis* for the Court to order a dismissal, the following **Local**

Rule 6 of this District Court will be pertinent, because it spells out strict and detailed provisions *requiring notice* and other acts by the moving party as a *prerequisite* to *motions to dismiss*:

> "(a) The time of *hearing motions* shall be *fixed* by the court. Dates of hearing shall not be specified in the notice of the motion unless prior authorization be obtained from the judge or his secretary. When time is not specified in the notice, request for hearings may be made by either counsel after the motion has been filed.
>
> (b) Motions *to dismiss*, for summary judgment, and for judgment on the pleadings *shall* be accompanied by a *brief*. An adverse party *shall have 15 days* after service of the movant's brief to *file an answer brief*. Failure to file briefs within the time prescribed shall subject such motions to summary ruling and without oral argument." (Our emphasis).
>
> District Court Rule 6 (a) (b) (Effective March 1, 1960).

Rule 83 of Civil Procedure entitled "Rules by District Courts," which is the *only* rule devoted to that *subject*, reads:

> "Each district court by action of a majority of the judges thereof may from time to time *make* and amend *rules* governing *its practice not inconsistent* with these rules. *Copies of rules* and amendments so made by any district court shall upon their promulgation be *furnished to the Supreme Court* of the United States. In all cases *not provided for by rule*, the district courts may regulate their practice in any manner *not inconsistent* with these rules." (Our emphasis).

In the Commentaries under the above Rule 83 is the following:

> "The intention of the Committee was to provide a simple, *unified* system which would be governed by a

single, brief *body* of rules. * * *. Daniel K. Hopkinson, *23 Marq. L. Rev. 159.*" (Our emphasis).

Present Local Rule 10 of this District Court, effective March 1, 1960 (formerly its **Local Rule 11** effective September 1, 1955), which is headed "Dismissal of Civil Actions Because of Lack of Prosecution" and which is the *only* Local Rule of this District Court on the *subject* of dismissal, reads, without change from the 1955 edition:

> "Civil cases in which *no action* has been taken for a period of *one year* may be dismissed *for want of prosecution* with judgment for costs *after thirty days notice* given by the clerk to the attorneys of record unless, for good cause shown, the court orders otherwise." (Our emphasis).

Neither the District Court nor the Court of Appeals' majority opinion sought to sustain the dismissal on the above **Local Rule 10**, nor could they, because the record shows that during the *year* preceding the dismissal of October 12, 1960, the *defendant* had filed additional interrogatories to the plaintiff on March 11, 1960 and the plaintiff filed answers thereto on April 15, 1960, *so both sides had been active within the year.* (R. 7-9).

Petitioner regards the above **Local Rule 10** as pertinent here under the doctrine that "the expression of one excludes the other".

Questions Presented for Review.

(1) The *extent* of a District Court's asserted "inherent power" in a civil case, *beyond the Rules of Civil Procedure, and beyond the District Court's local rules.*

Specifically applying the above question: When this petitioner-plaintiff's personal injury case was at issue, but *not set for trial*, and the Court had called for counsel to

come in for *a pre-trial conference*, by means of a mimeographed letter, and plaintiff's counsel failed to attend this noticed hearing,—did the District Court have the "inherent power" to enter final judgment dismissing the action with prejudice on account of this failure, *in the absence of any Rule of Civil Procedure or any local rule of the District Court authorizing such dismissal under such circumstances?*

(2) Secondary to No. 1, — if such "inherent power" did exist, did the District Court abuse the power in this case, in view of the fact that before the hour for the pre-trial hearing, plaintiff's counsel conveyed word to the Judge and to opposing counsel of his inability to attend the hearing that particular day, stating it was due to his necessary absence that day 160 miles away in Indianapolis working on an urgent case in the Supreme Court of Indiana, but that he would be ready to attend the conference the *next day* or any day thereafter?

(3) Necessarily arising out of the above questions is the question whether this majority opinion and decision requires reversal, (a) for its *confusing and destructive effect* upon the *Rules of Civil Procedure* and its distortion of the doctrine of *"inherent powers"* of the District Courts, or (b) for its violation of basic constitutional principles and violation of Petitioner's constitutional rights, or for both reasons (a) and (b).

Concise Statement of the Case.

The facts material to consideration of the questions here presented are very short and simple and are largely indicated already under the preceding headings "Questions Presented," and "Constitutional Provisions, Rules, etc. Involved".

Jurisdiction vested in the District Court under diversity of citizenship on the petitioner-plaintiff's complaint alleging severe and permanent personal injuries and praying damages exceeding the jurisdictional amount.

The printed Transcript of Record contains a complete chronological list of the docket entries in the case in the District Court from its beginning (R. 1-6) plus all orders and other papers in the case since July 2, 1959, including the transcript of the *ex parte* pre-trial hearing of October 12, 1960 at which the Court dismissed the case. (R. 11-16). It shows:

Complaint was filed August 4, 1954. Defendant filed a motion for judgment on the pleadings on April 30, 1955, which motion the Court sustained November 30, 1955. Plaintiff appealed and obtained reversal with directions to vacate the judgment and proceed with the case. *Link* v. *Wabash Railroad Co.* (7 Cir. 1956), 237 F. 2d 1, certiorari denied 352 U.S. 1003. Mandate went down to the District Court on March 13, 1957.

Without listing all the succeeding proceedings, they included an order of June 4, 1959 setting the case for trial on July 22, 1959. Then on July 2, 1959, an order was entered reciting "*At defendant's request*, to which request plaintiff agrees, trial of this case set for July 2, 1959 is *continued until further assignment* by the court. (R. 6).

There never was any trial setting made in the case *at any time thereafter* (R. 6).

The only proceedings from that indefinite trial continuance on July 2, 1959 until the pre-trial conference and dismissal of October 12, 1960, consisted of the *defendant* filing additional interrogatories for plaintiff to answer on March 11, 1960, to which, after a granted extension, the plaintiff filed answers on April 15, 1960. (R. 6, items 13-21).

The facts concerning the pre-trial conference of October 12, 1960, are recited sufficiently for present purposes in the Court of Appeals' majority opinion, 291 F. 2d at pp. 544-545. It recites that notice had been mailed to counsel on both sides on September 29, scheduling a pre-trial conference in the case for October 12, 1960 at 1 P.M., *pursuant to Local Rule 12* (above quoted at p. 4 hereof). Notice was received by counsel on both sides. On the *forenoon* of Wednesday, October 12, 1960, plaintiff's counsel called by telephone from Indianapolis (160 miles distant from the court in Hammond, Indiana) and asked the Judge's secretary for permission to talk with the Judge, but the latter was on the bench, so then plaintiff's counsel *asked her to convey to the Judge the following message* (which she did prior to the hour of hearing), namely, that he was in Indianapolis—and that he was *busy preparing papers to file with the Indiana Supreme Court*, though he was not actually engaged in argument, "that he *couldn't* be here by 1 o'clock (Wednesday, October 12), but he *would* be here either Thursday afternoon (*one day later*) or any time Friday (two days later) if it could be re-set." She told plaintiff's counsel she would convey this message to the Court and opposing counsel which she apparently promptly did to both of them before the scheduled hour of 1 P.M. Defendant's counsel told the Court at the hearing that plaintiff's counsel had called him on the preceding morning (October 11) from Indianapolis and had then stated *he expected to be in court for the pre-trial*. He said the Judge's secretary conveyed to him the above message from plaintiff's counsel on the forenoon of October 12. The opinion next goes on to say:

> "The trial judge then reviewed the history of this litigation and pointed out that plaintiff's counsel had notice of the hearing, did not appear for the hearing and had failed to indicate any 'reasonable reason' for

ARGUMENT.

I.

Inherent Evils in This Distortion and Over extension of the "Inherent Powers" of District Courts.

Confronted by a simple situation where *no ground for involuntary dismissal*, was authorized in *Rule 41(b)* of Civil Procedure or in the *Local Rule 10 (former No. 11)* on dismissal (pp. 5-7 *supra*), these courts below have *created their own undefined grounds* for dismissal, *outside the letter and spirit of the Rules of Civil Procedure* established by this Court. This, they have done by putting forth a confused doctrine which:

(a) Announces the doctrine that District Courts have "*inherent power*" to dismiss cases, *without* any Rule of Civil Procedure or any Local Rule *authorizing* dismissal in the given situation. (291 F. 2d at p. 545, point 4, R. 21-22).

(b) They seem, at first, as if they are going to predicate this power upon *Rule 83* of Civil Procedure which authorizes "each district court" to make and amend *rules* governing its practice *not inconsistent* with these rules." Rule 83 requires that "*Copies of rules* and amendments so made by any district court *shall* upon their promulgation *be furnished to the Supreme Court of the United States.*" But admittedly this District Court *had no local rule* authorizing this dismissal. The Local Rule on that subject *did not* authorize such a dismissal. (p. 7 *supra*). The *majority opinion frankly admits the lack of any authorizing rule* and states that the District Court *did not base this dismissal* on either the *Local Rule* or *Rule 41(b)* of Civil Procedure. (291 F. 2d at p. 545, point 3, R. 21).

(c) Then they proceed to *distort and enlarge* the next and final sentence of *Rule 83*, which reads:

> "In all cases not provided for by rule, the district courts may *regulate* their practice in any manner *not inconsistent* with these rules." (291 F. 2d at p. 545, point 3, R. 21).

The "inconsistency" and havoc which would be created in the Rules of Civil Procedure across the *nation by this distortion* permitting each district court to render final judgments of dismissal (or other equally important matters) under the guise of "regulating their local practice", *outside the Rules of Civil Procedure*, and *without* even a promulgated *local rule* to authorize it or to guide attorneys or safeguard litigants, *all unknown to the Supreme Court* until some victim of the unpublished "practice" comes up on certiorari,—is obvious.

(d) Next, the majority opinion reverts to the "inherent power" doctrine,—but this time it is enlarged to justify dismissals as "sanctions," imposed under no defined standards to enforce vague compliances (including necessarily an attorney's inability to get to a pre-trial conference on schedule as in this case. (291 F. 2d 545, point 4, R. 21-22).

If this Court permits that majority opinion to stand, then the Rules of Civil Procedure, which represent great labor not only by this Court but by able and dedicated committees, will become a mockery, relied upon by lawyers and litigants, but actually subject to be nullified by any District Court at any time in any case, under this newly announced "inherent power" of each District Court to "regulate its practice" (they ignore the plain and *necessary* purpose and intent of the words "not inconsistent with", though they do lip service to them by quoting them.)

"Regulate *what practice?*" The plain purpose of this language was to give the District Courts enough authority to handle minor local practice problems, which necessarily differ in different courts and parts of the country.

But not to cast aside the nationwide *Rule 41(b)* on the *major* subject of "Involuntary Dismissals" and the final judgments resulting therefrom,—often cases of large amounts and national importance.

If *this* Rule of Civil Procedure is subject to be nullified or evaded or modified at the will or whim of any District Court under the guise of "regulating its procedure", *which* of the Rules of Civil Procedure are *not* subject to be by-passed?

And if a District Court has a Local Rule covering the subject of *dismissal*, as this one had, what good is it if the Court can by-pass it and make up a different rule or "practice" on the spur of the moment?

This majority opinion in effect makes every District Court a self-governed barony, so far as procedure is concerned, *only nominally under* the Supreme Court's Rules of Civil Procedure.

Under the old Conformity Act, we at least had the protection of the settled state practice in the federal courts.

The resulting injustice, evils, confusion and depreciation of the Supreme Court's function, at least in procedural matters, are apparent without further elaboration.

Petitioner does not argue—nobody argues—against giving District Courts and all courts the "sanctions" necessary to maintain respect and orderly procedure, *within the framework* of the *Rules of Civil Procedure* and the *Constitution*. The Rules of Civil Procedure *spell out many*

sanctions appropriate to various situations. (For instance, the *discovery Rules 30(g)* and *Rule 37(b) and (d)*). But *nowhere in those Rules is there authorized or indicated such an abortive and arbitrary dismissal as this one,* under the guise of a "sanction" for no reason except that plaintiff's counsel "had failed to indicate any reasonable reason" for not arriving. How could he speak for himself and give "reasonable reasons" in his absence?

There is no showing in the Record of proceedings in the District Court or in the majority opinion that the case was in any way delayed by counsel's *one day* delay in arrival. *The opinion admits that the case had previously been delayed during a two year period 1955-1957 by the District Court's error in granting judgment on the pleadings upon defendant's erroneous motion therefor* (291 F. 2d at p. 543, second column, R. 18). The defendant fought the plaintiff to the Supreme Court on that issue on its unsuccessful petition for certiorari. *That error of the District Court cost the plaintiff much money and his counsel much labor.* Yet the District Court, at the abortive, *ex parte* pre-trial hearing expressed some indignation and concern over the alleged inconvenience to the Court and defense counsel on account of plaintiff's counsel's delaying *one day.* (R. 13, 15-16). And both the Court and defense counsel joined in complaining about the *age* of the case, though their own errors had put much of the age on it. (R. 13-16).

While we do not think that alleged *fault* of plaintiff's counsel for being absent, is material to the main issue above discussed, *the admitted facts stated in the majority opinion show that no reasonable fault existed* (291 F. 2d at pp. 544-545, R. 20).

The latter part of the majority opinion erroneously implies that at oral argument plaintiff's counsel "conceded" fault in not getting to the conference. (291 F. 2d at p. 546, second column, R. 23, bottom). The Appellant's Brief in the Court of Appeals, which has come up here bound with the Record Appendix under that Court's practice (its *Rule 16a*) shows that it contained a vigorous defense of counsel's *lack* of fault under a section headed "Adequate Showing of Inability of Plaintiff's Counsel to be Present" (p. 11 of brief). In oral argument we adhered to the same position. Why should the victim apologize? What the opinion apparently refers to is our answer to a *hypothetical* question from the bench,—*if* a plaintiff's attorney were at fault in not attending a hearing, what sanction should be imposed? Our answer was that *if* such a thing occurred, the court would have ample power to discipline the attorney as an *officer* of the court, but not to *dismiss* his client's case. Our position is the same now.

Dismissal on Court's Own Motion, When the Defendant Could Not Have Thus Obtained This Dismissal at That Time and Manner.

This "inherent power" doctrine, wherein the District Court took the initiative and in effect dismissed the case *on its own motion*, as a supposed "sanction" imposed for the absence of plaintiff's counsel, had an unusual and probably unprecedented result:

Under all the existing dismissal rules, *the defendant's counsel could not have obtained this dismissal judgment*, at this pre-trial hearing, *without motion* or notice of motion for such dismissal.

Rule 41(b) of Civil procedure requires that for any failure of the plaintiff to prosecute or to comply with the

Rules of Civil Procedure or any order, "*a defendant may move* for dismissal".

Local Rule 6(b) required generally and *without qualification that Motions to dismiss* must be accompanied by a supporting brief, with 15 days for an answer brief. (See quotation, p. 6 *supra*.)

The record shows that at no time, during or after the pre-trial hearing, did defense counsel file or serve a written motion to dismiss, *or even go so far as to make an actual oral motion to dismiss during the hearing*. The transcript of the hearing shows that the Judge took the initiative throughout the hearing. He merely asked defense counsel for his "thinking", and counsel (Mr. Bodle) "suggested" to the Judge that the latter had this "inherent power" to dismiss, but *refrained* from making any actual motion:

The Judge had called in his secretary to relate on the record her telephone call from plaintiff's counsel that forenoon, which she obviously had already reported to the Judge before the hearing (see p. 10 above, also R. 13). The following then took place:

> "The Court: That is all, as you recall it, that was said?
>
> Miss Griffith: Yes sir.
>
> The Court: Thank you. Under the circumstances, what is *your thinking*, Mr. Bodle?
>
> Mr. Bodle: I would certainly *suggest* to the Court that *it has inherent authority to dismiss cases*, not only under its own local rule concerning prosecution, but it has *inherent power, without any specific rule*, by virtue of Federal Rule 83, and *the inherent power of the Court to dismiss* where the Court *thinks* it necessary under the particular *situations not provided for by any specific rule*. (Our emphasis). (R. 13-14).

Then, after some further discussion, mainly consisting of the Judge and defense counsel joining in criticizing plaintiff's counsel for not getting there and blaming him of the "age" of the case, the Judge *on his own motion*, dismissed the case and directed the Clerk to enter the dismissal judgment. (R. 16).

Thus it is clear as a matter of law that under all available dismissal rules (pp. 5-7 *supra*), *the defendant could not have moved for, and in fact did not move for a dismissal*, but *the Judge, taking the initiative throughout the hearing, ordered a dismissal in the absence of plaintiff's counsel*, without the latter *knowing* that any dismissal was impending or contemplated, and without so much as giving him an *opportunity to get back the next day and be heard* in opposition.

This is one illustration of the evils, injustices and abortive procedure which flow from this "inherent power" doctrine, *derived from distorting the scope and purpose of Rule 83 of Civil Procedure*.

Uniformity of the Federal Rules of Civil Procedure.

Except the Supreme Court, the Constitution placed the *creation* and *procedure* of all federal courts in the hands of Congress:

> "The *judicial power* of the United States shall be vested in one Supreme Court, and in *such inferior courts* as the congress *may* from time to time *ordain and establish*. * * *" (Our emphasis).
>
> Constitution, Article 3, Sec. 1.

In 1934 Congress delegated to the Supreme Court this function of regulating practice in the District Courts in civil law actions (the equity practice having been previously placed under Supreme Court control):

ACT EMPOWERING THE SUPREME COURT OF THE UNITED STATES TO PRESCRIBE RULES

THE ACT OF JUNE 19, 1934, CH. 651

"Be it enacted * * * That the Supreme Court of the United States shall have the power to *prescribe*, by *general rules*, for the *district courts* of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the *practice* and *procedure in civil actions* at law. Said rules shall neither abridge, enlarge, nor modify the *substantive* rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time *unite* the *general rules* prescribed by it for cases *in equity* with those in actions *at law* so as to *secure one form of civil action and procedure* for both: * * *" Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U.S.C., Title 28, §§ 723b, 723c, now §2072). (Our emphasis).

28 U.S.C.A., front page XI, preceding Rule 1.

The Supreme Court by its original Order of January 3, 1935 (followed by subsequent amending Orders) undertook this function:

ORDERS OF THE SUPREME COURT OF UNITED STATES REGARDING CIVIL RULES

"Order of January 3, 1935, Appointing Advisory Committee

1. *Pursuant to Section 2* of the Act of June 19, 1934, c. 651, 48 Stat. 1064 the Court will undertake the preparation of *a unified system of general rules* for cases in equity and actions at law in *the District Courts* of the United States and in the Supreme Court of the District of Columbia, *so as to secure one form of civil action and procedure for both classes of cases*, while maintaining inviolate the

right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights.

2. To assist the Court in this undertaking, the Court appoints the following Advisory Committee to serve without compensation:

* * * * *

3. It shall be the *duty of the Advisory Committee*, subject to the instructions of the Court, to prepare and submit to the Court a draft of *a unified system of rules* as above described." (Our emphasis).

* * * * *

28 U.S.C.A., front pages XIII and XIV preceding Rule 1.

The Rules of Civil Procedure thus created start out with the following guidepost:

"Scope of Rules.

These rules *govern* the procedure in the United States *district courts* in *all* suits of civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They *shall* be construed to secure the *just*, speedy, and inexpensive determination of every action. As amended Dec. 29, 1948, effective Oct. 20, 1949." (Our emphasis).

Rule 1 of Rules of Civil Procedure.

Uniformity of procedure in all the District Courts is the purpose spelled out in the above Act of 1934, this Court's *Order of January 3, 1935*, and also spelled out in the opening *Rule 1* (supra) and the entire body of the Rules of Civil Procedure as an entity,—whose original creation and subsequent improvement have involved enormous labor by the Supreme Court and its successive Advisory Committees. One indication of the merit of their work, is the fact that many States have copied or adopted these Rules

in whole or in part. (See for instance the Florida and Ohio cases on this present Pre-Trial problem under their similar Rules, pp. 37-40 *infra*).

The Act of 1934 delegates to this Court the "*power* to *prescribe*, by *general* rules, *for the District Courts* • • • *the practice and procedure in civil actions at law.*" This is followed in Sec. 2 by power for this Court "at any time" to "unite" its existing Equity Rules with those in actions at law, "*so as to secure one form* of civil action and *procedure* for both".

This Court's order of January 3, 1935 appoints a distinguished advisory committee "*to assist this Court in this undertaking*" (par. 2) and directs them "to prepare and submit to the Court a draft of a *unified system* of rules as above described." (par. 3).

When this majority opinion below distorts and enlarges *Rule 83 of Civil Procedure* on the subject of Local Rules, and then takes off from there into the alleged undefined and unlimited "inherent power" of District Courts to *dismiss* cases with prejudice (and thereby destroy property rights) as a supposed "sanction" to enforce this "inherent power" at the District Court's "discretion", it violates: (1) the basic purpose of Congress and the Supreme Court by *destroying the uniformity* of practice spelled out in the Rules of Civil Procedure, and (2) it allows each District Court to not only make Local Rules but to use its "inherent power" *on the spur of the moment* to destroy these cases at its own whim ("discretion") *in the absence* of *Rule of Civil Procedure* or any *Local Rule* in the absence of any *order* made or violated in this particular case, thereby not only making a mockery of the "uniformity" of the *Rules of Civil Procedure*, but also (3) violating basic con-

stitutional principles relating to the judiciary and violating this Petitioner's rights to *due process*.

The confused reasoning in the majority opinion to sustain this dismissal touches, confuses and violates several important fields in the law, namely:

Basic Nature of "Inherent Power" of Courts and Other Governmental Agencies.

This power *arises out of*, and is *limited to*, what is "reasonably proper and *necessary*" for the Court or other agency to perform its expressed functions:

> "Under our judicial system our courts have such powers and jurisdiction as are defined by our laws constitutional and statutory. Under our system there is no such thing as the *inherent power* of a court, 'if, by that, he meant a power which a court may exercise without a law authorizing it.' *Messner* v. *Giddings*, 65 Tex. 301. Of course, jurisdiction is granted by law when it is either directly conferred or ought to be implied from the jurisdiction directly granted. In other words, our courts have such powers and jurisdiction as are directly provided by law, and, in addition thereto, they have such further powers and jurisdiction as are ***reasonably proper*** and ***necessary***, —that is, *as ought to be inferred*, from the powers and jurisdiction directly granted. Generally speaking, we think the above rule applies *to every other department* of the State government. They have such powers, and *such powers only*, as are expressly conferred on them by law, constitutional and statutory, and *as ought* to be inferred, or implied from the powers directly conferred." (Our emphasis).
>
> Ex parte Hughes (S. Ct. Tex. 1939) 133 Texas 505, 129 S.W. 270, 273-274

"The *inherent powers* of courts are derived *from the laws* to which the courts owe their existence and

do not exist without express or implied grant". (Our emphasis)

21 C.J.S., Courts, Sec. 31, p. 41, note 79

"The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have *inherent power* to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

In *McVeigh* v. *United States*, 78 U.S. 11 Wall. 259 (20:80), the court, through Mr. Justice Swayne, said (p. 267 (81)):

'In our judgment, *the district court committed a serious error* in ordering the claim and answer of the respondent to be *stricken* from the files. * * *'" (Our emphasis).

Hoven v. *Elliott* (1897), 167 U.S. 409, 414, 417-418, 17 S. Ct. 841, 42 L. Ed. 215, 220, 221

There is now even less reason or authority for the District Courts to seek to enlarge their "inherent power" either by virtue of *Rule 83 of Court Procedure* or on asserted general principles, because the "uniform" Rules of Civil Procedure carefully *cover* the subject of *involuntary dismissals* (*Rule 41b*) and every other procedural matter normally arising in civil cases.

This brings into operation another widely operating principle, namely:

The Expression of One Excludes the Other.

Rule 41(b) of Civil Procedure, specifies the *grounds* and the *procedure* by which a defendant can obtain this im-

portant and dangerous destruction of a plaintiff's case (property right). The only grounds are:

> "For failure of the plaintiff to prosecute or to comply with *these* rules (of Civil Procedure) or any order of court."

But even if the grounds allegedly exist, the Rule is not and could not be self-executing or be executed by the District Court *on its own motion* as was done here (pages 10-12, 21-23, *supra*). This Rule provides that if the grounds allegedly exist, "a *defendant* may *move* for dismissal".

> "Under the general rule of *express mention* and *implied exclusion*, the express mention of one matter *excludes all other similar matters* not mentioned; • • • and an affirmative description of powers granted *implies a denial of non-described powers.* • • •" (Our emphasis). (Citing *Continental Casualty Co.* v. *U. S.*, quoted *infra*).
>
> 82 C.J.S., Statutes, Sec. 333, p. 668, notes 74-75.

> "The statement of conditions *negatives action* without the satisfaction of these requirements. Generally speaking 'a legislative affirmative description *implies denial of the non-described powers' Durousseau* v. *United States*, 6 Cranch (U.S.) 307, 314, 3 L. Ed. 232, 234."
>
> *Continental Casualty Co.* v. *United States* (1942) 314 U.S. 527, 533, 86 L. Ed. 426, 431, 62 S. Ct. 393.

> "The *judgment* of a court must be *exercised in the mode prescribed by the law of the land.* The *legislature* has the power to regulate the manner or to fix conditions under which the jurisdiction may be exercised.
>
> The *protective features* of statutes prescribing the *mode* in which jurisdiction may be exercised *must be substantially complied with*; • • •"
>
> 21 C.J.S., Courts, Sec. 89, p. 139, notes 36, 39.

Under the above Act of 1934, this Court's Order of January 3, 1935, its subsequent orders, and its decisions long before and after 1935, *every litigant and lawyer was entitled to assume* that the *Rules of Civil Procedure* were the "laws of the land", as much as if these Rules had been enacted by Congress. They were also entitled to assume that these "uniform" Rules could be relied upon as defining their procedural rights in what they did *not* say as much as in what they *did* say, upon the basic principles in the text and case last quoted.

There was no "vacuum" left for the District Court to fill in this situation by Local Rule or order. At least the Court could not fill it under its asserted "inherent power" to apply its "sanctions".

The opinion, while confusedly speaking of *Rule 83 of Civil Procedure* on dismissal and this District Court's former *Local Rule 11* (now renumbered as Local Rule 10) which permits dismissal of cases entirely *inactive* for one year *after 30 days notice,—frankly admits that this dismissal was not and could not be based* upon *Rule 41b* of Civil Procedure for *lack of any motion by the defendant*, nor upon *Local Rule 11* (now 10) because the case had been active on *both* sides within the year preceding dismissal and no notice was given. (See pages 7, 9-10 *supra;* also 291 F. 2d at page 545, point 3, R. 21).

Hence, it is not presently necessary for this Court to pass upon the validity of such local rules for dismissal of inactive cases. The majority opinion below points out the immaterial fact that in an earlier case having no connection with this one, it upheld this *Local Rule 11* (*now 10*) and in that case it injected a *dictum* about "inherent power", after which certiorari was denied (*Darlington* v. *Studebaker-Packard Corp.*, 7 Cir. 1959, 261 F. 2d 903, 905, cert. den. 359 U.S. 992). But this Court has repeatedly pointed out

that *denial of certiorari does not in any way imply approval of the result or the language of the lower court's opinion, nor bind this Court in any way in future cases which it accepts.*

Involuntary Dismissals Are Governed by the Applicable Rules of Civil Procedure,—Not by "Inherent Power" of the District Court.

In the following case involving alleged *failure to comply* with a District Court's *order* made under Rule 34 for production of documents, the District Court based its *dismissal* both upon *Rule 37(b)(2)* of Civil Procedure which expressly *authorizes* the sanction of dismissal for violation of such discovery orders, and also "*under its own inherent power.*" The Court of Appeals upheld the dismissal, not upon *Rule 37* but upon *Rule 41(b)* "*and on the District Court's inherent power.*" **The Supreme Court, refusing to approve this "inherent power" doctrine,** which, as here, had been relied upon by the District Court and the Court of Appeals, held that: "In our opinion, **whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively under Rule 37.**" The Court said on that subject and also on the "*due process*" aspect of the case:

> "• • • Nevertheless the (district) court, in February 1953, *granted the Government's motion to dismiss the complaint* and filed an opinion wherein it concluded that: • • • and (4) that the court in these circumstances had power *under Rule 37(b)(2)*, as well as *inherent power*, to dismiss the complaint. 111 F. Supp. 435. • • •
>
> • • • • •
>
> "• • • This order was *affirmed* by the *Court of Appeals*, • • •. The court found it *unnecessary* to decide whether *Rule 37 authorized dismissal* under these circumstances since it ruled that the District Court was

empowered to dismiss **both** by **Rule 41(b)** of the Federal Rules of Civil Procedure, **and under its own 'inherent power.'** It did, however, modify the dismissal order to allow petitioner an additional six months in which to continue its efforts. 96 U.S. App. D.C. 232, 225 F. 2d 532. We denied certiorari. 350 U.S. 937, 76 S. Ct. 302, 100 L. Ed. 818.

* * * * *

"* * * Finally, petitioner presented the District Court with a plan, already approved by the Swiss Government, which was designed to achieve maximum compliance with the production order: A 'neutral' expert, who might be an American, would be appointed as investigator with the consent of the parties, District Court and Swiss authorities. * * *

* * * * *

"The District Court, however, refused to entertain this plan or to inspect the documents tendered in order to determine whether there had been substantial compliance with the production order. *It directed final dismissal of the action.* The Court of Appeals *affirmed*, but at the same time observed: 'That (petitioner) and its counsel patiently and diligently sought to achieve compliance * * * is not to be doubted.' 100 U.S. App. D.C. 148, 149, 243 F. 2d 254, 255. Because this decision raised important questions *as to the proper application of the Federal Rules of Civil Procedure*, we granted certiorari. 355 U.S. 812, 78 S. Ct. 61, 2 L. Ed. 2d 30.

* * * * *

"We consider next *the source of the authority* of a District Court *to dismiss a complaint for failure* of a plaintiff *to comply* with a *production order*. The District Court found power to dismiss under *Rule 37(b)(2)(iii)* of the Federal Rules of Civil Procedure as well as in the *general equity powers* of a federal court. *The Court of Appeals chose not* to rely upon *Rule 37*, but rested such power on *Rule 41(b)* **and on the District Court's inherent power**.

"*Rule 37 describes the consequences* of a refusal to make discovery. Subsection (b), which is entitled 'Failure to Comply With Order,' provides in pertinent part:

> "(2) • • • If any party • • • refuses to obey • • • an order made under Rule 34 to produce any document or other thing for inspection • • •, *the court may make* such orders in regard to the refusal as are just, and among others the following: •
>
> • • • • •
>
> "(iii) An order striking out pleadings or parts thereof • • •, *or dismissing the action* or proceeding or any part thereof • • •."

"*Rule 41(b)* is concerned with involuntary dismissals and reads in part: 'For failure of the plaintiff to prosecute or to comply with *these rules* or *any order of court*, a defendant *may move* for dismissal of an action or of any claim against him.'

"In our opinion, **whether a court has power to dismiss a complaint** because of noncompliance with a production order **depends exclusively upon Rule 37**, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is 'just.' • • • **Reliance** upon Rule 41, which cannot easily be interpreted to afford a court more expansive powers than does Rule 37, **or upon 'inherent power,' can only obscure analysis of the problem before us**. See generally Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col. L. Rev. 480.

• • • • •

"We turn to the remaining question, whether the District Court *properly exercised* its powers under *Rule 37(b)* by *dismissing this complaint* despite the findings that petitioner had not been in collusion with the Swiss authorities to block inspection of the Sturzenegger records, and had in good faith made diligent efforts to execute the production order.

• • • • •

"The provisions of *Rule 37* which are here involved *must* be read in light of the provisions of the *Fifth Amendment* that no person shall be deprived of property *without due process* of law, and more particularly against the opinions of this Court in *Hovey* v. *Elliott*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215, and *Hammond Packing Co.* v. *State of Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530. These decisions establish that there are *constitutional limitations upon the power of courts*, even in aid of their own valid processes, *to dismiss* an action *without affording a party the opportunity* for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C. (1952 ed) p. 4325, 28 U.S.C.A.

• • • • •

"These *two decisions* leave open the question whether *Fifth Amendment* due process is violated by the *striking of a complaint* because of a plaintiff's liability, despite good-faith efforts, to comply with a pre-trial production *order*. The presumption utilized by the Court in the *Hammond* case might well falter under such circumstances. Cf. *Tot* v. *United States*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519. Certainly *substantial constitutional questions* are provoked *by such action*. • • •

• • • • •

"In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that *Rule 37 should not be construed to authorize dismissal* of this complaint because of petitioner's noncompliance with a *pre-trial* production *order* when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." (Our emphasis).

Societe Internationale, etc. v. *Rogers* (1958) 357 U.S. 197, 201, 203, 206-210, 212, 78 S. Ct. 1087, 1090-1096, 2 L. Ed. 1255.

• • • • •

Fallacy that Failure to Comply with a "Local Rule" Is Equivalent to a Violation of an "Order" in the Case, as Ground for the Court to Apply the "Sanction" of Dismissal.

Another facet of the confused complex of reasons given in the majority opinion to support this dismissal is this: It starts with the dubious statement that:

> "*Local Rule 12* had been *promulgated* by an order of the court. Certainly a *notice* sent pursuant to an order of the court *embodied* in a court *rule*, does and should have *all the force and effect of an order of the court.*" (291 F. 2d at p. 545, point 2, R. 21).

This *Local Rule 12* (carrying no sanction in itself as do *Rules 37(b) and (d)* and *Rule 41(b)* of Civil Procedure) reads in its entirety:

> "The court *may* hold pre-trial *conferences* in any civil case upon *notice* given to counsel for all parties." (Our emphasis).

The majority opinion admits that there was no *order* in the case directing anybody to appear at this pre-trial conference but that it was scheduled by "notice mailed to counsel for both parties" on September 29, 1960, which was duly received. (291 F. 2d at p. 544, first column, R. 19).

The majority opinion (p. 545, point 4, R. 21-22) brands as "sheer sophistry" our contention to the Court of Appeals that we had not failed to comply with an "order" in the case under *Rule 41(b)*, because this Local Rule and notice did not purport to be an "order" in the case and was never filed with the District Court's clerk or made a part of the record. (R. 4, bottom, showing no order or

proceeding from April 15, 1960 when plaintiff filed answers to interrogatories and October 12, 1960 when the pre-trial conference came on and the Judge dismissed the case on his own motion).

The majority opinion admits that this dismissal was *not based* on a violation of *Rule 41(b)* or on any rule relating to dismissal. Then it *lumps together* "*rules, orders* and *proceedings*" (the last term undefined) and holds that the District Court had "inherent power" to "impose appropriate sanctions for failure to comply" with *any* of these things. (291 F. 2d at p. 545, point 4, R. 21-22).

The inference, not clearly stated, is that failure to attend this "conference" pursuant to *Local Rule 12* and the notice, *was as potent* to invoke this "inherent power" and "sanction" of dismissal as a failure to comply with an "*order*" in the case *would* have been if there had been an order. This argument defeats itself, because if *Local Rule 12* and the notice constituted an "order", the dismissal should have been sought and made (if justified) on *motion by the defendant*, which was *not* done.

But the main damage which this part of the majority opinion's argument does to the *Rules of Civil Procedure* and to the law generally is that it obscures or wipes out the important distinction between an "order" and a "Local Rule" of the particular court.

> "• • • These words 'rule' and 'order', when used in a statute, have a definite signification. They are *different* in their *nature* and *extent*. A *rule*, to be valid, must be *general* in its scope, and undiscriminating in its application; an *order* is *specific* and *limited* in its application. • • •" (Our emphasis).
>
> *Morris* v. *Board of Pilot Com'rs.* (1894) 7 Del. Ch. 146, 30 Atl. 667, 669

There are many kinds of "Local Rules", usually on minor procedural or administrative matters affecting litigants and attorneys generally. "Orders" are of many kinds, but they affect only specific rights and duties of litigants in a specific case. "Orders" are appealable, either when entered or upon final adjudication of the case. "Local Rules" are not applicable. They, unlike "orders" are filed with the Clerk of the Supreme Court, under *Rule 83 of Civil Proc dure*.

It must be assumed that the Supreme Court and its Advisory Committee knew and intended the distinction between a "Local Rule" (which is only mentioned in one Rule (83), and "orders" in a case which are provided for in many of the Rules, with specified "sanctions" for their enforcement in many of them such as *Rules 37(b)(d)* and *41(b)*.

Recent Cases Holding That Failure of an Attorney for Plaintiff or Defendant to Attend a Pre-Trial Conference Does Not Subject the Plaintiff to Dismissal or the Defendant to a Default.

"* * * Counsel were *notified* of the date and place for pre-trial conference but neither the plaintiff nor his *counsel* appeared *nor gave any reason* for their absence. Failing in this, the court entered an order dismissing the case 'with prejudice' at the cost of the plaintiff. This appeal is from that order.

The point for determination is whether or not the trial court committed error in dismissing the cause for failure of plaintiff or his counsel to attend the pre-trial conference.

Common Law Rule 16, 30 F.S.A., and Equity Rule 77, 31 F.S.A. provide that the 'court may of its own motion or shall on motion of either party to the cause direct and require the attorneys for the parties to appear before it for conference * * *

* * * * *

The pre-trial conference rule was *extracted from the Federal Rules of Civil Procedure*, 28 U.S.C.A. * * * it is the duty of counsel to attend or seek a continuance for cause. He should not treat the call with *indifference* or *ignore* it *as he did in this case*. * * * Counsel are expected to conform with this *rule* as they would any other *rule*, or be called to account for failure to do so.

The court unquestionably has power to *discipline counsel* for *refusal* or failure to meet the requirements of the rule. Such refusal may warrant a citation for contempt or a lesser degree of punishment, but it is our view that the major punishment for such delicts should ordinarily be imposed on counsel rather than on the litigant. Dismissal 'with prejudice' in effect *disposes of the case*, not for any dereliction on the part of the litigant, but on the part of his counsel. We are not unmindful of the rule that counsel is the litigant's *agent* and that his acts are the acts of the principal, but *since the rule is primarily for the governance of counsel, dismissal 'with prejudice' would in effect punish the litigant* instead of his counsel. Although *persistent* refusal to attend might, in the interest of justice, require a dismissal *without* prejudice, we think for the reasons given that such dismissal upon the *first infraction* is *too severe*." (Our emphasis).

Beasley v. *Girten* (Supreme Ct., Fla., Division A, 1952), 61 So. Rep. 2d, 179, 180-181.

"The record discloses further that in accordance with the rules of court the case was *assigned for pre-trial* on February 7, 1956; that *neither defendant nor counsel appeared* in obedience to the command of the court that they do so; and that plaintiff and its counsel did so appear. Thereupon, the court approved the following judgment entry, to-wit:

'This day this cause came on to be heard on the petition of the plaintiff, the answer of the defendant, the reply of the plaintiff, and the *order* of this court

dated December 16, 1955, *setting* for *pre-trial hearing* Tuesday, February 7, 1956, and specifically requiring both parties to be present in court.

'Upon hearing, the defendant and/or defendant's counsel having failed to appear, as required by this court's previous *order* hereinbefore set out, the court having examined the written evidence offered by the plaintiff, * * *

'The court further finds that the *defendant is in default for failure to appear* in court in compliance with the court's previous *order* hereinbefore set forth, and that the defendant is indebted to the plaintiff in the sum of $509.60 plus interest at 6% per annum from September 16, 1954, in the amount of $45.87 making a total of $555.47.

* * * * *

* * * Authority for pre-trial proceedings in this state is of comparatively recent origin; hence, we have been able to find only one reported Ohio case on the question presented. The case referred to is *Szabo* v. *Waradi*, Ohio App. 44 N.E. 2d 270, 36 Ohio Law Abst. 407, the first paragraph of the headnotes of which is:

> 'A pre-trial *rule authorizing* the judge, *upon failure of counsel for defendant to appear*, to proceed with the case, allow amendments, fix the number of witnesses, decide all preliminary matters and make proper findings, *does not intend that upon failure of counsel for defendant to appear, the court should finally dispose of any case where issues of fact are disclosed by the pleadings*, and does not deprive defendant of the *right to a jury trial* after having a default judgment entered against him; consequently, the refusal of the court to grant defendant a jury trial is prejudicial error.'

The opinion in that case was written by Judge Skeel of the Eighth Appellate District and is in accordance with our views on the question we have here. See, also, textbook entitled 'Pre-Trial' by Harry D. Nims, page 153.

The judgment is reversed, and the cause is remanded for further proceedings according to law." (Our emphasis).

Universal C. I. T. Credit Corp. v. *Stires*, 103 Ohio App. 405, 145 N.E. 2d 541, 543.

The very name pre-trial "conference", used in both *Rule 16 of Civil Procedure* and *Local Rule 12*, as well as the stated procedure and *objectives* in *Rule 16*, rebut the idea that upon mere notice and failure to attend, either party should summarily lose his case:

"The procedure at pretrial conferences *depends* on the terms of the governing *statutes* and *rules*. The participants in a pretrial conference should adhere to the *spirit* of that procedure, and have been held to waive questions not there presented. In order to accomplish the *purpose* of pretrial procedure and make it serve a useful purpose in the process of adjudication, there must be a *spirit of co-operation between the court and the counsel* representing litigants; there must be a mutual understanding of what may properly be accomplished by a pretrial conference. The court and attorneys should approach the pretrial procedure with a *cordial and co-operative attitude; the court should not lose patience* or permit the attorneys to engage in heated arguments. It is the duty of counsel to attend *or to seek a continuance* for cause; the court has *power* to *discipline counsel* for a *refusal* or failure to attend a pretrial conference, and such *refusal* may warrant a citation for *contempt* or a lesser degree of punishment. *On the failure of counsel* for a party to appear, the pretrial judge *may* have authority to *proceed with the case*, allow amendments, fix the number of witnesses, *decide all other preliminary matters*, and make such findings as are proper. • • •" (Our emphasis).

88 C.J.S., Trial, Sec. 17(2), p. 46.

A very old Supreme Court decision involved a problem such as might now arise under *Rule 41(b)*, and though not

exactly in point, the decision and reasoning support our position:

> "The 15th section of the Judiciary Act of 1789, under which these proceedings were had, *authorizes the court*, upon motion and due notice thereof, *to require a party to produce books* or writings in his possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and *if a plaintiff shall fail* to comply with such *order*, it shall be lawful for the court, *on motion, to give the like judgment* for the defendant as in cases of *nonsuit*.
>
> The transcript does *not* show that any *motion* was made for an *order* upon the plaintiff to produce the books and papers mentioned in the notice. It shows that a motion was made to render a judgment of nonsuit for not complying with the notice, and also a motion for a continuance of the case. *But the court is not authorized* by the Act of Congress to enter a judgment of nonsuit upon the *failure* of the party to comply with the *notice*. The notice is merely a preliminary proceeding, to enable the party to bring before the court the motion for the order to produce; and when that motion is made, the party called on has a right to be heard, and he is not bound to produce the books and papers called for, until the court shall *order* him to produce them, and is in no default *unless* he refuses or neglects to obey the *order*. The court was, therefore, right in refusing to enter the judgment, *when no order* had been moved for or granted." (Our emphasis).
>
> *Thompson* v. *Selden* (1858) 61 U.S. 195 (20 How. 195) 15 L. Ed. 1001, 1002

And the following recent case, though not on the point of pre-trial, seems quite applicable to rebut the majority opinion in this case holding in effect that for the great offense of being *one day* late in attending this pre-trial

"conference", the plaintiff should suffer the "sanction" of dismissal and destruction of his case, for which no logical or fair reason was given by the District Court or by the majority opinion:

> "Nor is there any reason suggested why '*demoralization of the court's authority*' would have resulted from giving the petitioner *a reasonable opportunity* to appear and offer a defense in open court to a charge of perjury or to the charge of *contempt*. * * *
>
> It is 'the law of the land' that no man's life, liberty *or property* be forfeited as a *punishment* until there has been a *charge fairly made and fairly tried* in a public tribunal. See *Chambers* v. *Florida*, 309 U.S. 227, 236, 237, 60 S. Ct. 472, 477, 84 L. Ed. 716. The petitioner was convicted without that kind of trial." (Our emphasis).
>
> *In re*: *Oliver* (1948) 333 U.S. 257, 277-278, 68 S. Ct. 499, 509-510, 92 L. Ed. 682

Pre-Trial Rule 16 Gives No Power of Dismissal Not Otherwise Contained in the Rules of Civil Procedure.

The Courts have held that pre-trial *Rule 16* "confers *no special power of dismissal* not otherwise contained in the rules":

> "In dismissing the action the district court *relied* upon *Rules 16 and 11(b)*, 28 U.S.C.A. Rule 16 appears to have been invoked on the theory that *dismissal at the pre-trial stage is proper where it* clearly appears that plaintiff *will be unable to* prove the allegations of its complaint. We hold, however, that *Rule 16 confers no special power of dismissal not otherwise contained in the rules.* * * *" (Our emphasis).
>
> *Syracuse Broadcasting Corporation* v. *Newhouse*, (2 Cir. 1958) 271 F. 2d 910, 914.

Even as to recalcitrant parties who were evading *orders* for discovery and the like (which did not occur in the

present case), dismissal with prejudice was applied with great caution:

> "• • • Dismissal with prejudice is a *drastic sanction* to be applied only in *extreme* situations. *Gill* v. *Stolow*, 2 Cir., 1957, 240 F. 2d 669; *Producers Releasing Corp. de Cuba* v. *PRC Pictures*, 2 Cir., 1949, 176 F. 2d 93, and here the preclusion order seems an ample penalty for any lack of cooperation on plaintiff's part.
>
> We hold that *dismissal was improper.*" (Our emphasis).
>
> *Syracuse Broadcasting Corporation* v. *Newhouse*, (2 Cir. 1958) 271 F. 2d 910, 914.

> "• • • These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to *dismiss* an action *without affording a party the opportunity* for a hearing on the merits of his cause. • • •" (Our emphasis).
>
> *Societe International etc.* v. *Rogers* (1958), 78 S. Ct. 1087, 1094, quoted at pp. 31-34 *supra*.

"Due Process" Rights of Petitioner Were Violated.

Viewing this peculiar, unnatural, abortive hearing and its unnecessary and unjust results, it seems to fall far short of the basic requirements of "due process of law" under the *Fifth Amendment*. This is why we said at page 3 *supra*, that we think it is optional with this Court to grant relief under the Fifth Amendment, along with a correction of the erroneous procedural concepts below:

> "In judicial proceedings, due process of law means law in *its regular course* of administration through courts of justice, in accordance with the fundamental principles of free government. • • •" (Our emphasis).
>
> 16 C.J.S., Constituted Law, Sec. 567, p. 541.

> "The constitutional guaranty of due process of law is intended to protect the individual *against arbitrary*

exercise of governmental power and secure to all equal protection of the law. It is a matter of substance, not of form, and does not guarantee against judicial error." (Our emphasis)

16A C.J.S., Constitutional Law, sec. 569, p. 559.

"Exercise of power. The due process clauses require that a power conferred by law be exercised *judiciously* with an honest intent to fulfill the purpose of the law, *and it is a part of the judicial function to see that the requirement is met.*" (Our emphasis).

16A C.J.S., Constitutional Law, sec. 569(3), p. 570.

Due to like effect, the Supreme Court decisions above quoted at pages 34, 42.

None of the cases cited in the majority opinion are comparable with what occurred in this case, and none of them sustain the abortive procedure or the unjust result in this case.

Darlington v. *Studebaker-Packard Corp.*, (7 Cir. 1959) 261 F. 2d 903, cited in the opinion at the bottom of p. 545, was where a case was dismissed under this same District Court's *Local Rule 11* (now renumbered as Rule 10) *after 30 days notice*. This Rule is quoted at p. 7 *supra*. *It is the same Local Rule 11 which the majority opinion says two paragraphs earlier is not involved in our case.* The short excerpt quoted from it is dictum. The point decided was that this Local Rule 11 was not inconsistent with the Rules of Civil Procedure, and hence was a valid local rule.

Wisdom v. *Texas Co.*, (D.C., N.D., Ala. 1939) 27 F. Supp. 992, 993, cited in the opinion at p. 546, involved a pretrial hearing, but the *defendant moved under Rule 41(b)* for dismissal for want of prosecution, which, as above shown, *the defendant did not do in this case*. Further the

majority opinion says on the preceding page, point 3, that this *Rule 41(b) is not involved in our case.*

Dalrymple v. Pittsburgh Consolidated Coal Co., (D.C. W.D. Pa. 1959) 24 F.R.D. 260, cited in the opinion at p. 546, is shown by the quoted excerpt to have involved "flagrant disobedience" of the court's rules, whereas there admittedly was *no rule disobeyed in our case.*

Likewise, it appears from the majority opinion's own descriptions and excerpts from its remaining cases cited at page 546, that none are in point with our facts and all seem to have involved *disobedience of orders* for which various sanctions were imposed.

The dissenting opinion of Judge Schnackenberg, (291 F. 2d 547, R. 24) is an able and sufficient discussion of the facts and law, sufficient in itself to demonstrate grossly wrong procedure and needless injustice inflicted upon the plaintiff. His opinion is fully supported by the cases above quoted at pages 37-40 and elsewhere in this Brief. We have not discussed it in detail in this Petition, because it speaks for itself. We have endeavored to present additional points of law and fact.

Conclusion.

Therefore, Petitioner respectfully submits that this Court should reverse the judgments of dismissal and affirmance below and direct that same be vacated, and he asks all further just and proper relief in the premises.

JAY E. DARLINGTON,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 422

WILLIAM LINK,

Petitioner,

vs.

WABASH RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent Wabash Railroad Company respectfully submits the following brief in support of its position that the judgment of the Court of Appeals for the Seventh Circuit herein, affirming a judgment of dismissal entered by the United States District Court for the Northern District of Indiana, upon wilful disregard by petitioner's attorney of a properly scheduled and noticed pretrial conference setting, should be affirmed.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

1. Respondent submits that no constitutional provisions are substantially involved or properly presented.

2. Rules 16, 41(b), and 83 of the Federal Rules of Civil

Procedure for the United States District Courts are involved. Rule 16 and Rule 83 are set out in petitioner's brief, but Rule 41(b) is only partially quoted by petitioner; hence this latter rule is set out here:

> "*Rule 41. Dismissal of Actions* . . .
>
> "(b) *Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court*, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision *and any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." (Emphasis added.)

Also involved are the local order dated January 7, 1960, entitled "Order of the United States District Court for the Northern District of Indiana Adopting Local Rules," appearing at p. i, pamphlet, "*Rules of the United States District Court for the Northern District of Indiana, Effective March 1, 1960*," which reads as follows (omitting the heading and formal parts):

> "It is Ordered that all existing local rules of the United States District Court for the Northern District of Indiana, including rules of general, civil and criminal practice and procedure, and rules of practice and

procedure in bankruptcy, shall be and hereby are revoked as of March 1, 1960.

"It is further Ordered that the following general local rules relating to practice and procedure in this District, numbered one to twenty-two, criminal rules numbered one to three and local rules relating to practice and procedure in bankruptcy, numbered one to twenty-one, be and the same are hereby adopted, effective on March 1, 1960.

"Dated this 7th day of January, 1960."

as well as *Rule 12* (cited also by petitioner), constituting one of the rules adopted by said order, appearing at p. 7 of said rules pamphlet, and reading as follows:

"*Rule 12. Pre-Trial Conferences.* The court may hold pre-trial conferences in any civil case upon notice given to counsel for all parties."

QUESTIONS PRESENTED FOR REVIEW.

Petitioner has added a completely new question in his brief, at p. 8, numbered (3), which was *not included in the petition for certiorari herein*, and which respondent respectfully suggests is not merely a "subsidiary question fairly comprised" within the other two questions stated in petitioner's earlier petition and present brief.

Respondent is dissatisfied with the questions as presented by the other side, and hence states the following as being the question presented:

Whether the trial court had, and properly exercised, power to dismiss the cause upon failure of plaintiff to appear through counsel at a pre-trial conference set pursuant to notice under a local rule, where plaintiff's counsel *intentionally remained in another, distant city to complete unrelated out-of-court work on the scheduled pre-trial date*, and first advised the court of his intention not to appear at the scheduled time and place.

by telephone only two and one-quarter hours before the scheduled time for the pre-trial.

STATEMENT OF THE CASE.

Respondent submits the following, pursuant to Rule 40(3) of the Supreme Court of the United States, in order to correct what respondent believes are material errors and omissions in petitioner's argumentative "statement" of the case, and in order to furnish a correct and concise statement of the material facts. Those deemed most pertinent to the present review are italicized:

This was a personal injury case caused by plaintiff's running into the side of defendant's train at a public crossing. Upon a prior appeal, action of the District Court in dismissing the complaint for failure to state a claim was reversed. No question in petitioner's 1961 appeal was predicated upon the questions presented by the previous appeal.

Subsequent to the mandate upon the previous appeal, *the case had been set for trial July 17, 1957; on June 27, 1957, on motion of the plaintiff, defendant not objecting, a continuance was entered.* (R. 2, fourth paragraph; also, R. 3, entries headed "6-21-57" and "6-27-57.") *This trial setting and continuance are completely omitted from petitioner's statement of the case.* On August 17, 1957, the defendant filed interrogatories addressed to the plaintiff, with certificate of service attached. (R. 2, paragraph 5, and R. 4, entry headed "8-17-57.")

On February 24, 1959, *the Court gave notice that the cause would be dismissed March 25, 1959, for failure to prosecute, pursuant to a local rule, unless otherwise ordered.* On March 24, 1959, plaintiff filed answers to the 1957 set of interrogatories. After various intervening arguments, motions and briefs, the Court entered an order

on June 4, 1959, *retaining the case on the docket*, and at the same time set the case for trial July 22, 1959. *All of these proceedings are omitted from petitioner's statement of the case*, except the last portion of the June 4 order. On July 2, 1959, at defendant's request, to which plaintiff agreed, the case was continued until further assignment. (R. 2, and R. 4, entries headed "2-24-59" through "7-2-59".) *At no time did plaintiff ever seek to advance the case or seek a trial setting.*

On March 11, 1960, the defendant filed further interrogatories addressed to plaintiff. After being granted an extension of time, plaintiff filed answers to these interrogatories, other than interrogatory 3, which was not completely answered. (R. 4, entries headed "3-11-60" through "4-15-60"; R. 9.)

On September 29, 1960, notice of a pre-trial conference to be held October 12, 1960, was sent out (R. 14, ll. 24-25), pursuant to Local Rule 12, and on October 12, 1960, upon failure of plaintiff's counsel to appear, the order of dismissal here involved was entered. (R. 4-5, 10, and 16.) As shown in more detail below, the record facts are that *plaintiff's counsel intentionally remained in Indianapolis*, to complete unrelated, out-of-court work on the scheduled date, and first advised the court that he would not attend the scheduled pre-trial, at 10:45 a.m. on the day set for the 1:00 p.m. conference.

Thereafter, on November 10, 1960, plaintiff filed his notice of appeal. *No intervening motions were filed*, nor was any other intervening action taken by plaintiff. On November 28, 1960, at plaintiff's request, a conference was held with the trial court, but *nothing was brought before the court by the plaintiff*, and the conference terminated. (R. 5.)

The dismissal was affirmed on appeal, and as shown at

p. 2 of petitioner's petition herein, certiorari was sought on the ninetieth day following the Court of Appeals' denial of rehearing.

The events of October 12, 1960, on which date the dismissal was entered, are accurately summarized in the Court of Appeals' decision sustaining the dismissal (291 F. 2d at 544, 545; R. 20) as follows:

> "The transcript of the proceedings had in court preceding the entry of the order of dismissal reveals the following factual situation which is not disputed by plaintiff.
>
> "The district judge's secretary was called into court and requested by the court to make a statement. She said that she mailed notice of the pre-trial conference to all counsel on September 29, 1960. She gave the following report to the court:
>
> > '*He (plaintiff's counsel) called about 10:45 (on Wednesday, October 12, 1960), and said he was in Indianapolis—that he was busy preparing papers to file with the (Indiana) Supreme Court. He said he wasn't actually engaged in argument* and that he couldn't be here by 1:00 o'clock, but he would be here either Thursday afternoon or any time Friday if it could be reset.
> >
> > 'At first he asked to talk to you, but you were on the bench, and he then asked if I could convey this to you.
> >
> > 'I asked him if he had contacted Mr. Bodle (defendant's counsel), and he said he had yesterday, and he said he couldn't be there, and I don't know, of course, if he meant for the pretrial or for the deposition.'
>
> "She stated that she told plaintiff's counsel she would convey this message to the court and opposing counsel. She also reported that this was the oldest civil case on the court docket. It further appeared that *this was the first and only attempt counsel made to have the pre-trial conference continued.*" (Emphasis added.)

The Court of Appeals further considered these facts in its opinion, at 191 F. (2d) 546, R. 23, as follows:

> "Plaintiff argues that there was adequate showing of the inability of his counsel to be present at the pre-trial conference. We disagree. *His brief refutes this contention* wherein he states, 'Plaintiff's counsel has *previously* become engaged in an important matter in the *Indiana Supreme Court*, not oral argument but preparing urgent papers of some kind, which required him to be in *Indianapolis*. As often happens in law work, the task took longer than expected, so that it occupied the day which had been set for this pre-trial conference * * *.' *With knowledge of the time and place of the pre-trial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it.* In our opinion, this falls far short of being a legitimate excuse for failing to appear in court at the time fixed." (Emphasis partially added.)

SUMMARY OF ARGUMENT.

The petitioner has based his entire argument on two completely false premises, one of law and one of fact:

1. The false legal argument is that the trial court had no power, inherently or under Federal Rule 83, to dismiss the action upon the deliberate disregard by plaintiff's counsel of the properly scheduled and noticed pretrial conference. He is unable to cite authorities stating any such rule, for the authorities are all to the contrary.

2. The false factual argument (which necessarily ignores the fact that counsel, mindful of the scheduled pretrial, deliberately stayed in another city until it was too late for him to get to the pretrial, and then called and announced his deliberate choice to the court) is that counsel was the innocent victim of unforeseen circumstances which rendered him unable to attend the pre-

trial. This is imaginative but unrelated to the record facts.

The authorities uniformly recognize the power and authority of the district courts to dismiss actions *of their own motion* in appropriate situations—including situations where, as here, there has been a disregard of a properly scheduled and noticed pretrial. *Rule 41(b)*, which refers to dismissals "not provided for in this rule", recognizes and reinforces this power. Such procedure was properly followed by the trial court and approved by the Court of Appeals in the instant case.

The district court had promulgated, by general order, Local Rule 12, authorizing the holding of pretrial conferences "upon *notice* given to counsel for all parties." A pretrial scheduled and noticed thereunder is called pursuant to a court rule and order, and sanctions may be imposed for the disregard of such pretrial settings, the same as for the disregard of any other order.

The notice of the pretrial itself is sufficient to charge parties and counsel with notice that disregard of the pretrial setting may result in the imposition of sanctions, including dismissal or default.

Where the facts show, as in the present case, that counsel deliberately chose to perform other, unrelated, out-of-court work in another city, instead of going back to attend a properly scheduled and noticed pretrial, a consequent dismissal of the action is well within the trial court's discretion.

Under uniformly recognized principles, the fault of the attorney is properly chargeable to the client in such a situation.

Review of the record also shows, by way of surround-

ing circumstances, absolutely no activity by the plaintiff, at any time since the former appeal, to do anything more than to simply keep the case pending on the docket. The trial court in the exercise of its discretion, properly took these circumstances into account.

The dismissal was properly carried out under established rules of law, and is not subject to the infirmities attributed to it by petitioner.

ARGUMENT.

1.

DISREGARD OF THE PRETRIAL SETTING, WHICH RESULTED IN THE DISMISSAL, STANDS AGAINST A BACKGROUND OF PETITIONER'S GENERAL LACK OF DILIGENCE OR INTEREST.

Plaintiff-petitioner never took any action whatever to advance this case, after its return to the trial court docket in March, 1957. The matters which petitioner declines to set out in his statement of the case, at page 9 of his present brief ("Without listing all the succeeding proceedings • • •") dealt mostly with proceedings on the court's own motion, during the period February 24-June 4, 1959, to dismiss this cause for plaintiff-petitioner's failure to take action for over one year. (R. 2, 4.)

The case was retained on the docket, *but plaintiff still never took any subsequent action*, other than to belatedly answer further interrogatories. Hence when plaintiff-petitioner's counsel deliberately stayed on in Indianapolis, on the day set for the pretrial, on unrelated out-of-court work, and made no effort to notify the court of this deliberate action until slightly more than two hours before the time set for the pretrial in Hammond (the two cities being, as petitioner states, some 160 miles apart), the action of the trial court in then dismissing the action, for failure of plaintiff's counsel to comply with the pretrial setting, obviously was not a sanction imposed against a previously diligent party or counsel.

2.

THE PRETRIAL CONFERENCE IN QUESTION WAS DULY AUTHORIZED AND VALIDLY SCHEDULED.

It is undisputed that the pretrial conference in question was scheduled, and notice thereof was given, pursuant to valid rules and procedures of the trial court. The Court of Appeals, in its decision affirming the dismissal herein, summary these threshold matters adequately at 291 F. (2d) 544. (R. 19.)

3.

THE DISTRICT COURTS HAVE INHERENT POWER, PRESERVED UNDER RULE 83 AND RECOGNIZED BY RULE 41(b), TO DISMISS CASES OF THEIR OWN MOTION, FOR WANT OF PROSECUTION OR DISREGARD OF COURT ORDERS, RULES AND SETTINGS.

The petitioner's primary argument, and his most intensely urged contentions herein, rest entirely upon the false premise that a District Court has no power to dismiss an action on its own motion, for lack of prosecution, or for disregard of its orders, rules or settings; and specifically that no such power exists with relation to disregard of pretrial proceedings. He argues, in the face of overwhelming authority to the contrary, that *Rule 41(b)* has pre-empted the entire subject of involuntary dismissals, and that the power to dismiss under the rules "could not be self-executing or be executed by the District Court on its own motion as was done here" (Petitioner's brief, p. 29); he even argues that the Court's inherent power to dismiss cases is "newly announced." (Petitioner's brief, p. 18.) In the absence of a dismissal motion by the *defendant*, he argues, the trial court is powerless to act—a novel doctrine.

These contentions are diametrically opposed to clear

long-established and uncontradicted rules of law, which are recognized and reinforced (not done away with) by Rule 41(b).

In the recent case of *Costello* v. *United States*, 365 U. S. 265, 5 L. Ed. (2d) 551 (1961), the Supreme Court recognized and discussed the effect of *sua sponte dismissals for failure to obey court orders*. The decision recognizes "• • • a *sua sponte* dismissal by the Court for failure of the plaintiff to comply with an order of the Court • • •" as a proper type of dismissal, not specifically provided for in *Rule 41(b)*. (365 U. S. at 286-287.) Likewise, in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 680 (n. 4), 2 L. Ed. (2d) 1077, 1081, the Court expressly pointed out that

> "While Rule 41(b) covers motions to dismiss made by defendants • • • it is not restricted to that situation."

Professor Moore states that

> "While Rule 41(b) provides that 'a defendant may move' for dismissal for want of prosecution, it has been held that a district court may—*either under this rule or Rule 83, or in the exercise of its inherent power* to keep its dockets clear—*dismiss on its own motion* for want of prosecution or provide by local rule for automatic dismissal of causes in which no action has been taken within a prescribed period. Such a local rule is not inconsistent with Rule 41(b) • • •.
>
> "What constitutes 'failure to prosecute', of course depends on the facts of the particular case • • • *(F)ailure to appear* • • • *at a pre-trial hearing* • • • *is sufficient to justify dismissal for want of prosecution.*"
>
> (Vol. 5, Moore's Federal Practice, Second Ed., sec. 41.11(2), pp. 1036-1038; citations omitted; emphasis added.)

To the same effect, see Vol. 2B, Barron & Holtzoff, *Federal Practice and Procedure*, Rules Edition, 1960 Rev., sec. 918, pp. 138-41.

(It may be noted that the petitioner, and to some extent Judge Schnackenberg in his dissent herein in the Court of Appeals, seem to assume that "want of prosecution" or "failure to prosecute" connote nothing more than inactivity over a prescribed period of time. However, a dismissal for disregard of or failing to appear at a scheduled proceeding, is also a dismissal for a particular sort of failure of prosecution. See *e. g.*, the text statements above cited from Moore and from Barron & Holtzoff. The trial court's inherent powers exist without regard to which terminology—"failure to appear" * * * "disregard of settings" * * * "failure to prosecute"—is used in a given case.)

The effect of Rule 41(b) as *recognizing and supplementing the district courts' inherent powers* was recently discussed by Circuit Judge Matthes, speaking for a unanimous court in *Janousek* v. *French*, 287 F. (2d) 616, 620-621 (C. A. 8, 1961):

> "Rule 41(b) of the Federal Rules of Civil Procedure provides that '(f)or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action * * *.' Although the rule authorizes dismissal on motion of defendant, *it is a cardinal principle of law that the court may dismiss on its own motion*, for Rule 41(b) expressly recognizes and incorporates the *inherent power* of courts to dismiss actions for lack of diligence in bringing them to trial. The authorities are legion and uniform in holding that the power to dismiss for failure to prosecute lies in the sound discretion of the court." (Emphasis added; citations omitted.)

Among the many other decisions stating and applying these principles, in cases where dismissals have been entered of the trial court's own motion, are the following:

Slavitt v. *Meader*, 278 F. (2d) 276, 277 (C. A. D. C. 1960); cert. denied 364 U. S. 831.

Darlington v. *Studebaker-Packard Corporation*, 261 F. (2d) 903, 905 (C. A. 7, 1959), cert. denied, 359 U. S. 992 (where the same attorney representing the petitioner herein unsuccessfully attacked a dismissal by the court under a local rule, as being "inconsistent" with Rule 41(b) and "violative" of Rule 83).

Reid v. *Prentice-Hall, Inc.*, 261 F. (2d) 700, 701 (C. A. 6, 1958).

Wright v. *Lumbermen's Mutual Casualty Co.*, 242 F. (2d), 1, 2 (C. A. 5, 1957); cert. denied 354 U. S. 939.

Shotkin v. *Westinghouse Electric & Mfg. Co.*, 169 F. (2d) 825, 826 (C. C. A. 10, 1948).

Hicks v. *Bekins Moving & Storage Co.*, 115 F. (2d) 406, 408 (C. C. A. 9, 1940).

It is not material whether a dismissal originates on motion of a party or of the court. The dismissal power exists, subject only to review for abuse of discretion, no matter how it is called into operation.

4.

THIS DISMISSAL POWER MAY BE INVOKED, AS IN THE PRESENT CASE, UPON FAILURE OF COUNSEL TO APPEAR FOR A PROPERLY SCHEDULED AND NOTICED PRETRIAL.

It is well established that the power may be exercised where a party or his counsel have failed to appear for a pre-trial conference:

Blue Mountain Construction Company v. *Werner*, 270 F. (2d) 305, 308 (C. A. 9, 1959); cert. denied 361 U. S. 931;

Erick Rios Bridoux v. *Eastern Air Lines*, 214 F. (2d) 207, 209 (C. A. D. C., 1954); cert. denied 348 U. S. 821;

Wisdom v. *Texas Co.*, 27 F. Supp. 992, 993 (N. D. Ala., 1939);

In the Matter of 1208, Inc., 188 F. Supp. 664 (E. D. Pa., 1960);

Vol 3, *Moore's Federal Practice*, 2d Ed., Sec. 16.07, p. 1110;

Vol. 1A, Barron & Holtzoff, *Federal Practice and Procedure*, Rules Ed., 1960 Rev., sec. 473, pp. 842-3;

Pretrial Procedure Committee Report, Judicial Conference of Senior Circuit Judges, 4 F. R. D. 83, at 96,

—as well as where counsel appears at pretrial but has not complied with any of the required pretrial procedures, *Dalrymple* v. *Pittsburgh Consolidation Coal Co.*, 24 F. R. D. 260, 261-2 (W. D. Pa., 1959); or later fails to comply with the pretrial order: *Package Machinery Co.* v. *Hayssen Manufacturing Co.*, 164 F. Supp. 904 (E. D. Wis., 1958), affirmed 266 F. (2d) 56 (C. A. 7, 1959); *Syracuse Broad-*

casting Corporation v. *Newhouse*, 271 F. (2d) 910 (C. A. 2, 1959).

In *Wisdom* v. *Texas C.*, 27 F. Supp. 992 (N. D. Ala., 1939), cited above, dismissal was entered forthwith upon plaintiff's failure to appear at a pretrial hearing ordered by the court. The dismissal resulted from a motion by the defendant, but as shown by the many cases cited above, the initiative could validly have come from the court on its own motion. There is no substantial difference between the *Wisdom* case and the instant case.

In *Erick Rios Bridoux* v. *Eastern Air Lines*, 214 F. (2d) 207 (C. A. D. C., 1954), cert. denied 348 U. S. 821, cited above, the defendant-counter-claimant failed to appear at a scheduled pretrial, in person or by counsel, and on appeal dismissal of his counterclaim, for such failure to appear, was affirmed (although a large monetary judgment against him was set aside.) The Court of Appeals stated that his "lack of diligence in respect to his counterclaim" should be made to bear "the consequences of his default." (214 F. 2d at 210.)

As in the other cases cited, dismissal upon failure of a party to appear in person or by counsel at a pretrial hearing also was approved and affirmed in *Blue Mountain Construction Company* v. *Werner*, 270 F. (2d) 305 (C A. 9, 1959), cert. denied 361 U. S. 931 (cited above). There plaintiff had indicated its refusal to appear or proceed further, a position which the court indicated it took "at its peril." In the instant case plaintiff's counsel, by telephone from a remote point shortly before the pretrial was to begin, asserted a belated desire to proceed, at his own convenience, at a later day (though he had done nothing to affirmatively prosecute the claim for several years since the former appeal herein), but, as the Court of Appeals held, the situation thus presented was simply one where

"With knowledge of the time and place of the pre-

> trial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it." (291 F. (2d) 542, 546.)

This was nothing more nor less than a *refusal to appear and proceed at the proper time*, and was likewise a position taken "at his peril."

As early as October, 1944, the Pretrial Committee of the Judicial Conference of Senior Circuit Judges submitted a general report on pretrial procedures to the Conference, which approved the report and authorized its distribution. The report recognized the sanction of dismissal for failure to appear at scheduled pretrials, and noted that such power had been exercised already by at least "several" district judges "because of failure of plaintiff's counsel to appear." *Pretrial Procedure Committee Report*, 4 F. R. D. 83, 96. As Judge Moscowitz, of the District Court for the Eastern District of New York, has pointed out,

> "* * * once the court desides to employ (pretrial) for any of the purposes set forth in the Rule, appearance by the attorneys for a conference is mandatory and defaults or nonsuits may be entered upon their unexplained absence."
>
> (Article, printed in 4 F. R. D. 216.)

Clearly, an absence "explained" only, as in the instant case, by the *arbitrary decision of plaintiff's counsel to stay in another city and do out-of-court work on some other matter*, presents an even stronger justification for dismissal, because the possibility that the absence was unavoidable or unintentional is eliminated. Dismissal is a remedy sparingly applied, but certainly *deliberate disregard* of a scheduled pretrial (as against mere inadvertence) justifies its application.

Although not controlling, it is worth noting that in state courts, too, where pretrial procedure has been adopted, the power of the courts to dismiss for disregard of pretrial settings has been recognized and applied. Thus it has been held in Connecticut that

> "* * * the court has inherent power to provide for the imposition of reasonable sanctions to compel the observance of its rules. *Implicit in the assignment of a case for pretrial is an order that each party, through counsel, shall appear before the court*, prepared to accomplish, so far as possible, the various purposes of the hearing * * * If he comes unprepared, *he fails to comply with an order of the court, and such a failure is always ground for a nonsuit or default* * * *"

Stanley v. *City of Hartford*, 103 A. (2d) 148, (Sup. Ct. Errors, Conn., 1954; emphasis added).

Similarly, *Beasley* v. *Girten*, 61 S. (2d) 179 (Fla., 1952), cited by petitioner at pp. 37-38 of his brief herein, recognized the dismissal power, but the court there felt that the dismissal should have been without prejudice, and granted leave to the plaintiff "*to move for reinstatement*," providing that "*If the motion is shown to have merit*, it should be granted on conditions imposed by the Court." (61 S. 2d at 179; emphasis added.) This is simply the equivalent of granting the party *the same opportunity that was available to, and was rejected by, the petitioner in the present case under Rule 60(b) prior to this appeal.*

And the District of Columbia's Municipal Court of Appeals has approved the entry of a default judgment against a defendant whose attorney failed to appear for a pretrial conference which was apparently set only by telephone notice. *Turner* v. *Erwin*, 99 A. (2d) 222 (1953). (The trial court there properly required a separate hearing on *proof of damages*, as required in default judgments generally.

In *Universal C. I. T. Credit Corp.* v. *Stires*, 145 N. E. (2d) 541 (Ohio, 1956), quoted at pp. 38-40 of petitioner's brief, this was not done, and that case simply holds that this omission was error. The *Universal C. I. T.* case is similar in effect to *Syracuse Broadcasting Corporation* v. *Newhouse*, 271 F. (2d) 910, 914, also relied on by petitioner herein, where the Second Circuit recognized the propriety of dismissal for non-compliance with pretrial orders, but pointed out that pretrial cannot be used as a substitute for summary judgment proceedings or to rule on fact issues.)

Petitioner asserts at 35-36 of his brief that counsel's failure or refusal to appear at the pretrial in this case involved merely "failure to comply with a local rule," and that disobedience of a *rule* is somehow a lesser offense than disobedience of an *order*. To state the argument is to reveal its lack of substance; but further, as pointed out by the Court of Appeals in its decision herein, the notice of the pre-trial conference (which was, admittedly, timely sent out and received)

> "* * * was sent pursuant to Local Rule 12 of the district court. Local Rule 12 had been promulgated by an order of the court. *Certainly a notice sent pursuant to an order of the court embodied in a court rule does and should have all the force and effect of an order of the court.* Further, plaintiff has not cited any authority requiring that a pretrial conference be scheduled by a specific court order to give it validity. It is well settled that *court rules have the force of law. Weil* v. *Neary*, 1929, 278 U. S. 160, 169, 49 S. Ct. 144, 73 L. Ed. 243." (291 F. (2d) 542, 545; emphasis added.)

This accords with *Dalrymple* v. *Pittsburgh Consolidation Coal Company*, 24 F. R. D. 260 (W. D. Pa., 1959), where a local court order had promulgated a local pretrial rule—

which was disregarded by plaintiff in failing to prepare for a subsequently scheduled pretrial—and where dismissal was entered because of such "utter disregard of the court order embodied in the Rule," 24 F. R. D. at 262. See also *In the Matter of 1208, Inc.*, 188 F. Supp. 664, 666 (E. D. Pa., 1960), where the local pretrial provisions were characterized as a "standing order," and *Stanley* v. *City of Hartford*, 103 A. (2d) 148 (Conn., 1954), discussed above, holding that "Implicit in the assignment of a case for trial is an order that each party, through counsel, shall appear * * *" 103 A. (2d) at 149-150.

5.

NO FURTHER NOTICE WAS REQUIRED BEFORE ENTRY OF THE DISMISSAL. COUNSEL WAS CHARGEABLE WITH KNOWLEDGE OF THE POSSIBLE CONSEQUENCES OF HIS CONDUCT. IF EXTENUATING FACTS EXISTED HE STILL HAD THE RIGHT TO BRING THEM BEFORE THE TRIAL COURT UNDER RULE 60(B).

Nor is there any substance to petitioner's claim that he was entitled to specific notice of the dismissal before its entry. *Plaintiff's counsel already had notice of the scheduled pretrial setting*, and accordingly was chargeable with knowledge that a wilful disregard of the setting might result in sanctions, including dismissal. As was true in *Tinkoff* v. *Jarecki*, 208 F. (2d) 861, 862 (C. A. 7, 1953), (a "dismissal for want of prosecution" case), this is simply a case where "*plaintiff took a calculated risk when * * * he ignored the trial judge entirely.*"

"It has often been observed that a court has inherent power to dismiss, without notice": *Janousek* v. *French*, 289 F. (2d) 616, 622, n. 5 (C. A. 8, 1961), and cases there cited. Likewise, the Tenth Circuit has held that "* * * dismissal without notice of an action for failure to prosecute with reasonable diligence does not contravene any sustainable

concept of due process with which we are familiar." *Shotkin* v. *Westinghouse Electric & Mfg. Co.*, 169 F. (2d) 825, 826 (1948).

And of course *plaintiff was entitled to proceed under Rule 60(b), in the trial court*, to bring additional facts before the court, had there been any such meritorious facts available to him. Thus petitioner's protests, in his brief, that counsel was given no opportunity to be heard (p. 23) or to give "reasonable reasons for his absence" (p. 20) are hollow. If the trial court dismisses an action, or grants a judgment by default, against a party, the door to the trial court remains open under Rule 60(b), for the party to point out any mitigating circumstances to that court. Here the plaintiff didn't take advantage of the "open door"; although his counsel obtained a conference with the trial court on November 28, 1960, he *brought no motion before the court*, and the conference terminated without anything having been presented "upon which the court might act." (R. 5.)

6.

THE RECORD FACTS SHOW DELIBERATE DISREGARD OF THE PRETRIAL RULE AND SETTING BY PETITIONER'S COUNSEL, AND LACK OF GOOD CAUSE THEREFOR. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION IN DISMISSING THE CASE.

Shorn of the self-serving adjectives with which petitioner's brief surrounds the facts, the situation presented for review is simply one where, as stated by the Court of Appeals herein,

> "With knowledge of the time and place of the pretrial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it." (291 F. 2d at 546.)

He waited to do so, in a city *160 miles distant* from the courthouse (Petitioner's brief, p. 10, ll. 10-11), *until 10:45 a.m.* (R. 13, l. 14), *with the pretrial scheduled to begin at 1:00 p.m.* (R. 4, 3d line from bottom). He did not indicate that his continued physical presence in Indianapolis at that late hour was due to any accident, misfortune, or inadvertence. On the contrary, he simply stated that

> "• • • he was in Indianapolis—that he was busy preparing papers to file in the Supreme Court. He said he wasn't actually engaged in argument • • •" (R. 13, ll. 14-17.)

Under these facts, certainly the Court of Appeals was justified in holding that

> "• • • This falls far short of being a legitimate excuse for failing to appear in court at the time fixed." (291 F. 2d at 546.)

The Court of Appeals further points out that

> "In oral argument (petitioner's) counsel conceded that the district court might have disciplined him by imposing a lesser sanction • • •" (291 F. 2d at 546.)

Petitioner's counsel now denies that he made such a concession (Petitioner's brief, p. 21); but the court could certainly have "imposed a lesser sanction" for his conduct, whether or not he so concedes.

The *degree* of the sanction is the only issue. The trial court's discretion in fixing the sanction is of course exercised in light of all the circumstances of the case. The trial court fully considered the surrounding circumstances (R. 15-16), which, to state it mildly, *fail to give any indication that plaintiff attached any urgency or importance to prosecution of his claim*, and which *fail to establish that the disregard of the pretrial notice was "due to inability, and not to wilfulness, bad faith or any fault of petitioner."* Rather, they affirmatively show such wilfulness and fault.

The above quoted words were used by the Supreme Court to test the validity of a dismissal in *Societe Internationale, etc.* v. *Rogers*, 357, U. S. 197, 212, 2 L. Ed. (2d) 1255, 1267. The Court found, in that case, a due process issue where a complaint was stricken "because of a plaintiff's *inability, despite good-faith efforts*, to comply with a pretrial production order * * *," 357 U. S. at 210, 2 L. Ed (2d) at 1266 (emphasis added). *But the situation here is the very reverse*: The facts show a deliberate decision not to comply with the pretrial setting.

The non-compliance was not, as in the *Societe Internationale* case, "due to inability fostered neither by (plaintiff's) own conduct nor by circumstances within (plaintiff's) control * * *" (357 U. S. at 211; 2 L. Ed. (2d) at 1267) it was in fact due *entirely* to plaintiff's counsel's own conduct, and circumstances deliberately created by him.

The circumstances of the instant case are analogous to those in *Garden Homes, Inc.* v. *Mason*, 249 F. (2d) 71, 72 (C. A. 1, 1957), cert. denied 356 U. S. 903, which was an appeal from a judgment of the lower court ordering dismissal of a complaint with prejudice, where counsel for plaintiff failed to appear at the time of a trial setting. On the day of the hearing, plaintiff's attorney informed the clerk (by letter) "that he could not be present at the trial on Wednesday morning, March 6, in Concord, because he would be appearing before the Supreme Judicial Court of Massachusetts." 249 F. (2d) at 72. In affirming the dismissal, the Court of Appeals for the First Circuit stated:

> "*Under the circumstances, considering also other instances in the case of failure diligently to prosecute*, as pointed out by appellee, we cannot say that the district court abused its discretion in dismissing the complaint." (249 F. 2d at 72; emphasis added.)

In the instant case, the factors supporting dismissal are obviously much stronger: *Counsel had no conflicting court*

date, but voluntarily elected to stay on in another city on other, unrelated business. (Indeed, the trial court here indicated a willingness to take a more lenient view than did the court in *Garden Homes*, "* * * if counsel was engaged before a court or had some other reason why he could not physically be here * * *": R. 15, ll. 30-32. If any such factors existed, it is obvious they would have been brought forth in proceedings herein under Rule 60b.)

It is not an abuse of discretion for a court to dismiss an action even where plaintiff's failure to respond to a court rule was due to pressure of counsel's trial commitments in other courts. See, in addition to the *Garden Homes* case, *supra*, *Darlington* v. *Studebaker-Packard Corporation*, 261 F. (2d) 903, 905-6 (C. A. 7, 1959), cert. denied 359 U. S. 992, holding that the trial court was justified in dismissing a case where delays had been due to the fact that counsel was "under a continuous and heavy burden of trial work which could not be avoided or delayed." *Cf. Rooney* v. *City of East Chicago et al.*, 129 Ind. App. 128, 148 N. E. (2d) 842 (Ind. App., 1958) (appeal dismissed for delays resulting from the fact that appellant's counsel "was too busy elsewhere* * *") (129 Ind. App. at 133). See also *Ledwith* v. *Storkan*, 2 F. R. D. 539 (D. Nebraska, 1942), in which analogous cases from a number of other jurisdictions are discussed.

7.

RULE THAT ACTS AND OMISSIONS OF ATTORNEY ARE CHARGEABLE TO HIS CLIENT ANSWERS THE CHIEF OBJECTION RAISED IN JUDGE SCHNACKENBERG'S DISSENT.

The last objection made by petitioner, and the chief objection made by Judge Schnackenberg in his dissent in the Court of Appeals, is that the faults or omissions of the lawyer should not be imputed to his client. This objection was properly disposed of by the Court of Appeals herein:

> "The short answer to this is that the action or lack of action on the part of counsel is that of his client." (291 F. 2d at 546.)

The rule is based on general agency principles, and is set forth in Vol. 7 *C. J. S., Attorney and Client*, sec. 67, pp. 850-851, as follows:

> "The relation of attorney and client is one of agency, that is, the attorney is the agent of the client * * *. Thus, the client is bound, according to the ordinary rules of agency, by the acts of the attorney within the scope of the latter's authority. In general, whatever is done in the progress of the cause by such attorney is considered as done by the party, and is binding on him * * *"
>
> "In general, the omissions, as well as commissions, of an attorney are to be regarded as the acts of the client whom he represents, and his neglect is equivalent to the neglect of the client himself."

The attorney is regularly summoned to court for arguments, hearings, pretrials—not as an individual, but as the agent and representative of his client. The courts operate through attorneys, acting for their clients—and not just as messengers, but as representing and standing in the shoes of their clients.

A similar contention, that plaintiff should not be penalized because of the default of counsel, was raised and held to be "without merit" in *Dalrymple* v. *Pittsburgh Consolidation Coal Co., supra,* 24 F. R. D. 260, 261 (W. D. Pa., 1959) and also in *Ledwith* v. *Storkan, supra,* 2 F. R. D. 539, 544 (D. Nebraska, 1942), where the court stated:

> "Inevitably, the argument of the defendants must proceed to the point where they assert, that having employed counsel for the protection of their interests, they did all that could be expected of them and are entitled to absolution for their attorney's negligence. But that seems not to be a tenable position, for by the weight of authority the negligence of counsel in this behalf is imputed to his client." (2 F. R. D. at 544.)

Nor is there anything to the contrary in *Allegro* v. *Afton Village Corp.,* 87 A. (2d) 430 (S. Ct. N. J., 1952), the only case cited in Judge Schnackenberg's dissent. In fact, in that case part of the court's concern was that the plaintiff had at times appeared on his own behalf, and since "the court was dealing with a layman, not an attorney, an officer of the court," the Appellate Court thought it was "problematical whether or not he fully appreciated the import of the remarks made to him" as to procuring new counsel and complying with scheduled proceedings. 87 A. (2d) at 431. No such factor exists in the present case.

It should also be noted that Indiana courts have repeatedly applied the rule that the acts and omissions of an attorney in litigation are those of the client. See *e. g., Ferrara* v. *Genduso,* 214 Ind. 99, 101-2, 14 N. E. (2d) 580 (Ind. Sup. Ct., 1938) (which also discusses a number of earlier Indiana cases applying this rule); *Mockford* v. *Iles,* 217 Ind. 137, 145, 26 N. E. (2d) 42 (Ind. Sup. Ct., 1940).

8.

PETITIONER'S AUTHORITIES FAIL TO SUSTAIN HIS POSITION.

Petitioner still has cited no authorities contrary to respondent's position herein. He still relies on *Syracuse Broadcasting Corporation* v. *Newhouse*, 271 F. (2d) 910 (2d Cir., 1958), which he cites for the proposition that "Rule 16 confers no special power of dismissal not otherwise contained in the rules." In context (271 F. (2d) at 914), this statement was made immediately after the Court of Appeals' statement that the trial court had invoked Rule 16

> "* * * on the theory that dismissal at the pretrial stage is proper where it clearly appears that plaintiff will be unable to prove the allegations of its complaint."

The appellate opinion then properly pointed out that defendant's motion to dismiss on this ground should have been disposed of under the summary judgment procedure established by Rule 56. This in no way implies that a court cannot impose sanctions for disregard of pretrial procedures; *in fact the decision goes on to hold specifically that this would be proper*, where the particular facts justify imposition of this sanction. 271 F. (2d) at 914.

The case of *Societe Internationale* (*etc.*) v. *Rogers*, 357 U. S. 197, 2 L. Ed. (2d) 1255, cited and quoted at length by petitioner, involved a situation where plaintiff made repeated good-faith efforts to comply with a production order, but was deterred by fear of foreign criminal prosecution if it complied—a far cry from the present situation. In fact, as show in section 6 of this Argument, the *Societe Internationale* case supports respondent's position herein.

The general "due process" citations to C. J. S. at pp. 43-44 of petitioner's brief, are inapplicable: both the *facts* and

the *law* pertinent to this case (as shown above) establish that the dismissal was well within the trial court's discretion.

Petitioner's state court cases, quoted at pp. 37-40 of his brief, have been discussed above. His other authorities are not relevant to the issues of this case. Of these, *Re William Oliver*, 333 U. S. 257, 92 L. Ed. 682 (1948) may be noted. That was of course a criminal contempt case where petitioner was thrown in jail without being allowed to select counsel or to confront his accusers. It bears no resemblance of any sort to the instant case. *Thompson* v. *Selden*, 61 U. S. 195, 15 L. Ed. 1001 (1858), cited at p. 41 of petitioner's brief, involved only notices served by a *party*, on the opposing party, rather than notices served by the *court*, pursuant to its own rules and standing orders.

Petitioner's "*expressio unius est exclusio alterius*" argument with relation to Rule 41(b) and the local court rules (pp. 7, 28-31) and his generalized arguments against inherent and Rule 83 powers (pp. 17-28 of petitioner's brief) cannot stand in the face of the authorities cited in Sections 3 and 4 of this Argument.

CONCLUSION.

The authorities cited here establish the existence and validity of the power exercised by the trial court in dismissing the action, and the undisputed record facts show a situation where the trial court was well justified, and well within its proper discretion, in dismissing the action upon the deliberate disregard of the pretrial setting by petitioner's counsel. The dismissal in the trial court and the affirmance by the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted.

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